(1)

Supreme Court, U.S.
FILED

011079 JAN 18 2002

No. _____ OFFICE OF THE

IN THE

Supreme Court of the United States

SHEILA K. MONTGOMERY,
Petitioner,

v.

STATE OF MARYLAND et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

DEBORAH A. JEON
American Civil Liberties Union Foundation of Maryland
100 North Liberty Street
Centreville, MD 21617

ROBIN R. COCKEY
Cockey, Brennan & Maloney, P.C.
116 W. Main Street
Salisbury, MD 21801

JONATHAN R. SIEGEL
Counsel of Record
Professor of Law
George Washington University Law School
2000 H St., N.W.
Washington, DC 20052
(202) 994-7453

1388

QUESTIONS PRESENTED

1. Whether a state defendant that raises the defense of state sovereign immunity, but then expressly withdraws it, is thereafter barred from reasserting immunity.

2. Whether a complaint that generally alleges a violation of the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601 et seq., is sufficient to withstand a motion to dismiss, even though a court believes that the complaint does not allege sufficient specific facts to show a violation of the act, and even though the complaint contains inconsistent allegations relating to an alternative claim.

PARTIES TO THE PROCEEDING

Petitioner Sheila K. Montgomery was the plaintiff in the proceedings below.

Respondents, who were defendants in the proceedings below, are the State of Maryland, Maryland's Department of Public Safety and Correctional Services, Division of Corrections, Warden Robert Kupec, and Deputy Warden George Kaloroumakis.

TABLE OF CONTENTS

PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 2
A. Facts 2
B. Proceedings in the District Court 3
C. The Appeal 4
REASONS FOR GRANTING THE PETITION 7
I. THE STATE SOVEREIGN IMMUNITY ISSUE 9
A. The Ruling of the Court of Appeals Concerns an Important Issue of Federal Law 9
B. The Fourth Circuit's Ruling Conflicts with Decisions by Other Federal Courts of Appeals 13
C. The Court of Appeals' Ruling is Incorrect 15
II. THE PLEADING ISSUE 21
A. The Ruling of the Court of Appeals Concerns Important Issues of Federal Law 22
B. The Decision of the Court of Appeals Conflicts with the Decisions of Other Courts of Appeals 23
C. The Decision of the Court of Appeals is Incorrect 26
CONCLUSION 29
APPENDIX 1a

TABLE OF AUTHORITIES

Cases: Page

Alden v. Maine,
527 U.S. 706 (1999) 9, 10
American Nurses' Ass'n v. Illinois,
783 F.2d 716 (7th Cir. 1986) 23, 25
Arecibo Community Health Care, Inc. v. Commonwealth of Puerto Rico,
270 F.3d 17, 26-29 (1st Cir. 2001) 11, 13
Arguello v. Conoco, Inc.,
207 F.3d 803, 813 (5th Cir. 2000), *cert. denied*,
531 U.S. 874 (2000) 25
Atascadero State Hosp. v. Scanlon,
473 U.S. 234 (1985) 9
Bodine Produce, Inc. v. United Farm Workers Organizing Committee,
494 F.2d 541, 561-62 (9th Cir. 1974) 25
Branson School Dist. RE-82 v. Romer,
161 F.3d 619, 631 (10th Cir. 1998) 18
Chittister v. Department of Community and Economic Development,
226 F.3d 223, 227 (3d Cir. 2000) 12, 13
Clark v. Barnard,
108 U.S. 436 (1883) 17
College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,
527 U.S. 666 (1999) 9, 10, 11
Conley v. Gibson,
355 U.S. 41, 47-48 (1957) 22
Dellmuth v. Muth,
491 U.S. 223 (1989) 9

Edelman v. Jordan,
415 U.S. 651 (1974) 9, 15, 17
Ex parte Young,
209 U.S. 123 (1908) 6
Fleming v. AT&T Information Services, Inc.,
878 F.2d 1472 (D.C. Cir. 1989) 25
Florida Dept. of State v. Treasure Salvors, Inc.,
458 U.S. 670 (1982) 9
Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank,
527 U.S. 627 (1999) 9, 10
Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459 (1945) 17, 20
Green v. Mansour,
474 U.S. 64 (1985) 9
Gunter v. Atlantic Coast Line R. Co.,
200 U.S. 273 (1906) 16
Henry v. Daytop Village, Inc.,
42 F.3d 89 (2d Cir. 1994) 25
Hill v. Blind Industries & Services of Maryland, 179 F.3d 754 (9th Cir. 1999), *opinion amended*, 201 F.3d 1186 (9th Cir. 2000) 11, 12, 13, 16, 17, 18
Hoffman v. Connecticut Dept. of Income Maintenance, 492 U.S. 96 (1989) 9
Idaho v. Coeur d'Alene Tribe of Idaho,
521 U.S. 261 (1997) 9
In re Burke,
146 F.3d 1313 (11th Cir. 1998) 11, 13, 14
In re SDDS, Inc.,
225 F.3d 970 (8th Cir. 2000), *cert. denied*,
121 S. Ct. 1733 (2001) 11, 13, 14

Independent Enterprises Inc. v. Pittsburgh Water & Sewer Authority, 103 F.3d 1165 (3d Cir. 1997) 26
Kovacevich v. Kent State Univ., 224 F.3d 806 (6th Cir. 2000) 12, 13
Lapides v. Board of Regents of University System of Georgia, 251 F.3d 1372 (11th Cir. 2001), *cert. granted*, 122 S. Ct. 456 (2001) 8, 12, 14, 29
Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993) 22, 27
Molsbergen v. United States, 757 F.2d 1016 (9th Cir. 1985) 25
Newfield House, Inc. v. Massachusetts Dep't of Pub. Welfare, 651 F.2d 32 (1st Cir. 1981) 19
Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) 9
Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) 9
People of Porto Rico v. Ramos, 232 U.S. 627 (1914) 16
People of Porto Rico v. Rosaly, 227 U.S. 270 (1913) 15
Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) 15
Ramirez v. Puerto Rico Fire Service, 715 F.2d 694 (1st Cir. 1983) 15
Richardson v. Fajardo Sugar Co., 241 U.S. 44 (1916) 15, 16
Rodriguez-Suris v. Montesinos, 123 F.3d 10 (1st Cir. 1997) 26

Sao Vicente v. Transportes Maritimos do Estado,
281 F. 111 (2d Cir. 1922), *cert. dismissed*, 260 U.S. 151 (1922) 17
Scheuer v. Rhodes,
416 U.S. 232 (1974) 22
Seminole Tribe of Florida v. Florida,
517 U.S. 44 (1996) 9, 10
Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1998) 19
Sutton v. Utah State School for the Deaf and Blind, 173 F.3d 1226 (10th Cir. 1999) 11, 12, 14
Swierkiewicz v. Sorema, N.A.,
2001 WL 246077 (2d Cir. 2001)
cert. granted, 122 S. Ct. 23 (2001) 8, 22, 23, 29
Vermont Agency of Natural Resources v. United States ex rel. Stevens,
529 U.S. 765 (2000) 9, 10
Welch v. Texas Dept. of Highways & Pub. Transp., 483 U.S. 468 (1987) 9
Will v. Michigan Dept. of State Police,
491 U.S. 58 (1989) 9
Wisconsin Dep't of Corrections v. Schacht,
524 U.S. 381 (1998) 15, 17, 18, 19, 20

Constitutional Provisions:

U.S. Const.:
Amend. XI ..... *passim*
U.S. Const.:
Amend. XIV 3, 10

Statutes and Rules:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 3
28 U.S.C. § 2403(a) 1
Family and Medical Leave Act of 1993,
29 U.S.C. § 2601 et seq. ..... *passim*
29 U.S.C. § 2612(a)(1)(D) 2
29 U.S.C. § 2614(a)(1)(A), (B) 2, 26
42 U.S.C. § 1983 22
Title VII of the Civil Rights Act of 1964,
42 U.S.C. 2000e 24
Department of Labor regulations,
29 C.F.R. § 825.215 1
29 C.F.R. § 825.215(a) 26
29 C.F.R. § 825.216 1
Fed. R. Civ. P.:
Rule 8(e)(2) 25, 28
Rule 12(b)(1) 3
Rule 12(b)(6) 2, 4, 19, 25, 27
Supreme Court Rule 29.4(b) 1

PETITION FOR A WRIT OF CERTIORARI

Petitioner Sheila K. Montgomery respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, Appendix ("App.") A, is reported at 266 F.3d 374. (App. 1a). The opinion of the district court, Appendix B, is unreported. (App. 15a).

JURISDICTION

The court of appeals entered its judgment on September 26, 2001. (App. 1a). The court of appeals denied a timely petition for rehearing on October 23, 2001. (App. 19a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

The court of appeals held the Family and Medical Leave Act to be unconstitutional insofar as the Act purports to abrogate state sovereign immunity from suit. There was no formal certification of the issue under 28 U.S.C. § 2403(a), but the United States learned of the action and participated in the appeal as amicus curiae. Section 2403(a) may apply and the notifications required by Rule 29.4(b) have been made.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional provisions, statutes, and regulations are set forth in the Appendix. These provisions are:

United States Constitution, Amendment XI.

Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2612(a), 2614(a), 2615(a), and 2617(a).

Department of Labor regulations, 29 C.F.R. §§ 825.215, .216.

STATEMENT OF THE CASE

A. Facts

Because this case was ultimately dismissed on the basis of respondents' motion under Federal Rule of Civil Procedure 12(b)(6), the following statement assumes the facts pleaded in petitioner's complaint to be true.

Petitioner is an employee of the state of Maryland. She is employed by Maryland's Department of Public Safety and Correctional Services, Division of Corrections, at the Department's Eastern Correctional Institution ("ECI"), a prison. Prior to the facts giving rise to this case, petitioner was the principal administrative aide to the Warden of ECI.

On September 22, 1999, petitioner took a leave of absence in accordance with the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601 et seq. ("FMLA"), so that she could have necessary time to recuperate from surgery. The FMLA entitles eligible employees to take up to 12 weeks of leave during a 12-month period for certain, specified reasons, including "because of a serious health condition" that prevents the employee from working; upon return from such leave, an employee must be restored to the employee's previous position or to "an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." 29 U.S.C. §§ 2612(a)(1)(D), 2614(a)(1)(A), (B).

Petitioner returned to work on November 8, 1999. Upon her return to work, petitioner was informed that she was no longer the principal administrative aide to the Warden. Instead, she was now a secretary in the prison's maintenance department. Although her salary and benefits did not change, petitioner's new daily activities were "substantially different from and inferior to her duties and responsibilities in her former position as an administrative aide in the Warden's office, where she acted in a truly 'administrative' capacity, assisting the chief

executive of the facility in the performance of the Warden's functions." Complaint, ¶14.

B. Proceedings in the District Court

Petitioner filed this action in the United States District Court for the District of Maryland. She named as defendants the State of Maryland; the Department; ECI's Warden, Robert Kupec; and its Deputy Warden, George Kalorour akis.

Petitioner's complaint alleged the facts contained in the previous section. It also alleged certain details regarding petitioner's current and previous jobs. For example, petitioner alleged that in her previous job she was "the Warden's personal liaison with staff members at ECI, with DOC headquarters and with outside agencies." Complaint, ¶7. She alleged that her previous job entailed composing written communications for the Warden and maintaining his calendar. *Id.* Now, petitioner alleges, she performs only the "simplest, most menial of clerical functions," such as answering the phone and taking messages. Instead of composing written communications, she merely types them. Complaint, ¶14.

Petitioner's complaint contained two counts. Count I asserted that the respondents' actions violated the Due Process Clause of the United States Constitution. Complaint, ¶17. Count II asserted that the respondents had violated the petitioner's rights under the FMLA "[b]y refusing to reinstate [her], following her FMLA-protected leave, to a position the same as or substantially equivalent to" her former position. Complaint, ¶20. Petitioner sought a declaration that respondents had violated the FMLA, an injunction requiring them to restore her to her former position, compensatory damages, costs, fees, and other appropriate relief. Federal jurisdiction was based on 28 U.S.C. § 1331.

Respondents filed a motion to dismiss petitioner's complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and

12(b)(6). With regard to both counts of the complaint, respondents asserted that the complaint failed to state a claim upon which relief could be granted and that the defendants had sovereign immunity from petitioner's claims under the Eleventh Amendment to the United States Constitution. See Memorandum in Support of Motion to Dismiss 7-16.

Subsequently, however, the state, as the court of appeals later put it, "pursued . . . what might be described as an erratic approach to its own Eleventh Amendment defense." (App. 5a). Before petitioner responded to the motion to dismiss, respondents filed a letter with the district court withdrawing the defense of sovereign immunity as to Count II of the complaint. The letter expressly stated:

> The purpose of this letter is to withdraw, on behalf of all Defendants, the 11th Amendment immunity defense to Count II of the Complaint.

(App. 32a). Petitioner then responded to the remaining defenses in the motion to dismiss. *See* Opposition to Motion to Dismiss.

In ruling on the motion, the district court, notwithstanding the respondents' withdrawal of their assertion of state sovereign immunity, took up the issue of immunity *sua sponte*. The district court determined that the FMLA is unconstitutional insofar as it purports to abrogate state sovereign immunity, and it dismissed Count II of the complaint as to all defendants on that basis. (App. 15a, 18a). The district court also dismissed Count I of the complaint for failure to state a claim upon which relief could be granted. (App. 18a).

C. The Appeal

Petitioner appealed the district court's ruling to the United States Court of Appeals for the Fourth Circuit with regard to Count II of the complaint. (Petitioner abandoned the first count

of the complaint.) Petitioner argued that when a state defendant expressly withdraws the defense of sovereign immunity, a federal district court must respect the state's decision and may not consider the immunity defense. *See* Opening Brief for the Appellant 12-13. The respondents, in their appellate brief, defended the district court's power to raise the issue of immunity *sua sponte*. *See* Brief of Appellees 8-12. Petitioner also argued that the district court had erred in dismissing the claims against the individual respondents. *See* Opening Brief for the Appellant 28-31.

On appeal, the respondents, as the court of appeals put it, "reversed course" again. (App. 5a). At oral argument, respondents' counsel informed the court of appeals that the respondents *were* asserting sovereign immunity from suit. (App. 5a). On the day after argument, respondents' counsel filed a letter to "confirm the position . . . that the State appellees assert that the Eleventh Amendment bars the plaintiff's claim filed under the Family and Medical Leave Act." (App. 33a).

The court of appeals subsequently received supplemental briefing from both sides regarding the effect of the respondents' assertion of sovereign immunity at oral argument.[1] Petitioner argued that the respondents' previous withdrawal of the immunity defense, while the case was in district court, barred

---

[1] Respondents claimed that their original appellate brief asserted the defense of state sovereign immunity even prior to oral argument. *See* Supplemental Brief of Appellees at 1-2. There is a dispute as to whether this is true. In petitioner's view, however, this dispute is immaterial. As will be argued in this petition, respondents' withdrawal of the immunity defense in district court precluded them from raising it at any subsequent stage of the proceedings. To the extent it might matter whether respondents asserted the defense of immunity in their appellate brief, petitioner submits that they did not. Instead, they made the different argument that the district court was authorized to consider sovereign immunity *sua sponte*.

respondents from reasserting the defense on appeal. *See* Supplemental Brief for the Appellant 6-21.

The court of appeals then rendered its opinion. The court agreed with petitioner that a district court errs in considering the defense of state sovereign immunity *sua sponte* after a state defendant "affirmatively and unequivocally" withdraws the defense. (App. 4a). The court said "in a federal system with dual sovereigns, one sovereign must treat the other with a measure of respect," and "[t]his goal is undermined when a federal court imposes on a state a legal argument that the state first advanced but then affirmatively withdrew." (App. 5a).

The court went on, however, to hold that the respondents were empowered to reassert the defense of sovereign immunity on appeal notwithstanding their previous withdrawal of the defense. The court noted that "circuit precedent allows the Eleventh Amendment to be raised for the first time on appeal, regardless of whether the case was resolved on the pleadings . . . or upon a grant of summary judgment." (App. 6a). The court also held that, as a matter of Maryland state law, the state's Attorney General may not waive sovereign immunity on behalf of the state. (App. 7a). The court therefore permitted the respondents to assert immunity.

Having done so, the court held that sovereign immunity barred petitioner's claim against the state under the FMLA. The FMLA, the court held, does not validly abrogate the sovereign immunity of the states. (App. 9a).

The court held that immunity did not bar petitioner's claims against the individual respondents for an injunction reinstating her to her former position. These claims, the court held, could proceed under *Ex parte Young*, 209 U.S. 123 (1908). (App. 12a). The court held, however, that Count II of petitioner's complaint was properly dismissed because it failed to state a claim upon which relief could be granted. The court noted that petitioner has not lost any pay or benefits. (App. 13a).

Focusing on the specific differences alleged in petitioner's complaint between her current and previous jobs, the court held that the alleged differences go only to the "de minimis or intangible, unmeasurable aspects of the job" and do not state a cognizable claim under the FMLA. (App. 12a).

Finally, the court noted that petitioner's complaint also alleged that the respondents had transferred her to her new position in retaliation for her filing of a grievance that was unrelated to her FMLA leave. For this reason as well, the court held that petitioner's complaint failed to state a claim under the FMLA. (App. 14a).

REASONS FOR GRANTING THE PETITION

This case involves two important issues: one concerning waiver of state sovereign immunity and one concerning fundamental principles of pleading in the federal system.

1. While this case was in district court, the respondents initially raised the defense of state sovereign immunity, but then *expressly withdrew it.* The court of appeals should have held that this action barred the respondents from subsequently reasserting immunity. The court's decision to permit the respondents to assert immunity on appeal conflicts with decisions of other federal courts of appeals; it disregards the most relevant, recent decisions of this Court; it contradicts the rule that state sovereign immunity cannot be asserted once waived; and it will promote gamesmanship and waste of federal judicial resources by state defendants.

2. The court of appeals' decision also disregards the fundamental principle of "notice pleading" that underlies the rules of pleading in the federal system. It raises an important question regarding how to interpret a complaint that contains both general and specific allegations. Petitioner's general allegations that respondents refused to restore her to a

substantially equivalent position, Complaint, ¶20, and that her duties in her new job are "substantially different from and inferior to her duties and responsibilities in her former position[,]" Complaint, ¶14, plainly state a claim under the FMLA. The court of appeals rejected petitioner's complaint because it also pleads additional details regarding petitioner's new job, and the court believed that these details were not by themselves sufficient to state a claim. However, as other courts of appeals have recognized, a complaint's sufficient, general allegations may not be ignored simply because the complaint also contains specific allegations that a court believes are by themselves insufficient to state a claim. In addition, the court of appeals clearly erred in rejecting petitioner's complaint because it contained an alternative, inconsistent allegation; such allegations are expressly permitted by the federal rules.

Certiorari should be granted because, as to each issue, the court of appeals rendered a ruling that concerns an important issue of federal law, that conflicts with decisions of other federal courts of appeals, and that is incorrect.

In addition, as to each issue, the ruling is related to a pending case in which this Court has already granted certiorari. *See Lapides v. Board of Regents of University System of Georgia*, 122 S. Ct. 456 (2001) (No. 01-298) (state sovereign immunity issue); *Swierkiewicz v. Sorema, N.A.*, 122 S. Ct. 23 (2001) (No. 00-1853) (pleading issue). The results in these cases could significantly affect the proper decision of the present case. If this Court does not grant certiorari, it should hold this case pending the results in *Lapides* and *Swierkiewicz*.

I. THE STATE SOVEREIGN IMMUNITY ISSUE

Certiorari Should Be Granted So That this Court May Determine Whether a State Defendant That Raises a Claim of Sovereign Immunity, but Then Expressly Withdraws It, Is Thereafter Barred from Asserting Immunity.

A. The Ruling of the Court of Appeals Concerns an Important Issue of Federal Law

The court of appeals held that a state defendant may raise the defense of state sovereign immunity on appeal even after *expressly withdrawing* the defense in district court. This ruling raises an important question of federal law.

The general issue of the sovereign immunity of state defendants from suits under federal law is, of course, an important issue that has occupied this Court since the founding of the Nation. It has been much on the Court's docket in recent decades.[2]

In recent years, this Court has steadily diminished the set of

---

[2] For just some of the recent decisions, see *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96 (1989); *Dellmuth v. Muth*, 491 U.S. 223 (1989); *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989); *Welch v. Texas Dept. of Highways & Pub. Transp.*, 483 U.S. 468 (1987); *Green v. Mansour*, 474 U.S. 64 (1985); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984); *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982); *Edelman v. Jordan*, 415 U.S. 651 (1974).

circumstances in which federal courts may entertain suits against state defendants. This important trend began with *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), which held that Congress may not abrogate state sovereign immunity when acting pursuant to its powers under Article I of the Constitution. Several subsequent cases further limited suits against states. This Court held that private parties may not avoid state sovereign immunity by suing in state court rather than in federal court, *Alden v. Maine*, 527 U.S. 706 (1999); it held that a state does not implicitly consent to suit by engaging in activity regulated by federal law, *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); and it took a limited view of Congress's powers under section 5 of the Fourteenth Amendment, which do permit Congress to abrogate state sovereign immunity, *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999).

As the set of circumstances in which states may be sued diminishes, the remaining circumstances in the set take on increased importance. At the moment, it would appear that states may be sued only (1) by the United States or by other states, (2) when Congress, acting pursuant to its powers under section 5 of the Fourteenth Amendment, expressly authorizes suit by private parties, and (3) when a state consents to suit or otherwise waives its immunity. *See Alden*, 527 U.S. at 755-57; *College Savings Bank*, 527 U.S. at 675-76.

Because these appear to be the only remaining categories of cases in which federal courts may entertain suits against states, it is vitally important that the boundaries of each category be fully understood. The importance of such understanding may explain why this Court has recently taken cases to explore each category: *Florida Prepaid*, *supra*, considered the limits of Congress's power under section 5; *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000),

concerned the question of what constitutes a suit by the "United States" (although the case was ultimately decided on a different ground); and *College Savings Bank*, *supra*, explored the boundaries of "consent" to suit.

The remaining, least explored category is that of cases in which a state *waives* its sovereign immunity from suit. This category is obviously related to the "consent" category explored in *College Savings Bank*, but that case considered only whether a state generally consents to suit by engaging in federally regulated activity. What remains to be determined by this Court is when a state waives its immunity from suit in particular cases by actions taken in the course of litigation.

The importance of answering this question is underscored by the numerous, recent cases in which it has arisen. The question has vexed numerous courts of appeals, which have reached conflicting decisions. The Ninth Circuit, for example, has held that a state waives immunity simply by failing to invoke it until the first day of trial, *Hill v. Blind Industries & Services of Maryland*, 179 F.3d 754, 756-58 (9th Cir. 1999), *opinion amended*, 201 F.3d 1186 (9th Cir. 2000), whereas the Fourth Circuit, in the present case, held that immunity is not waived even if the state, after withdrawing the issue in district court, does not reassert it until the case is on appeal. (App. 6a). Numerous other courts of appeals have also considered the question, with conflicting results. *Compare In re SDDS, Inc.*, 225 F.3d 970, 973 (8th Cir. 2000) (waiver occurs when a state makes a general appearance and litigates on the merits), *cert. denied*, 121 S. Ct. 1733 (2001); *Sutton v. Utah State School for the Deaf and Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999) (waiver occurs when a state removes a case from state court to federal court and litigates on the merits); *Arecibo Community Health Care, Inc. v. Commonwealth of Puerto Rico*, 270 F.3d 17, 26-29 (1st Cir. 2001) (waiver occurs when a state files a proof of claim in a bankruptcy proceeding); *and In re Burke*,

146 F.3d 1313, 1319-20 (11th Cir. 1998) (same); *with Lapides v. Board of Regents of University System of Georgia*, 251 F.3d 1372, 1378 (11th Cir. 2001) (removal does not give rise to waiver), *cert. granted*, 122 S. Ct. 456 (2001); *Chittister v. Department of Community and Economic Development*, 226 F.3d 223, 227 (3d Cir. 2000) (no waiver even though the case was tried in district court and the state did not raise immunity until the case was on appeal); *and Kovacevich v. Kent State Univ.*, 224 F.3d 806, 816 (6th Cir. 2000) (same).

In light of the need to understand the limits of this remaining category in which suits against states are permitted, and in light of the frequent, conflicting decisions by courts of appeals that this issue has generated, the issue presented by this case is an important one that merits consideration by this Court.

This Court has, indeed, already granted certiorari this Term in a case presenting a question of waiver of state sovereign immunity. *See Lapides v. Board of Regents of University System of Georgia*, 122 S. Ct. 456 (2001) (No. 01-298). *Lapides* concerns the question of whether a state waives its immunity by removing a case from state court to federal court, a question also considered by the Tenth Circuit in *Sutton*.

The present case is importantly related to *Lapides*. Both cases concern the question of whether a state waived its immunity by actions taken in the course of litigation. Both cases also concern the relevance of state law to the determination of this question. The ruling in *Lapides* could easily have considerable influence on the proper decision in this case. Therefore, at a minimum, this Court should hold this case pending the decision in *Lapides*.

Beyond that, however, this Court should grant certiorari in this case regardless of what happens in *Lapides*. Although the cases are obviously related, this case and *Lapides* present distinct, complementary questions concerning the boundaries of the important waiver category. Unlike *Lapides*, the present case

began in federal court. Here, the waiver issue arises, not from the state's removal of the case *to* federal court, but from the state's conduct while the case was *in* federal court. Similar issues were presented in the *Hill*, *SDDS*, *Arecibo*, *Burke*, *Chittister*, and *Kovacevich* cases cited above.

Thus, this case presents a distinct, important, recurring question that has vexed the courts of appeals. It is a good vehicle by which this Court can explore the boundaries of one of the few, remaining categories of cases in which private parties may bring suits against states. This Court should grant certiorari.

B. The Fourth Circuit's Ruling Conflicts with Decisions by Other Federal Courts of Appeals

As mentioned above, the courts of appeals have reached conflicting decisions regarding waivers of state sovereign immunity. Because of its independent importance in guiding this Court's decision as to whether to grant the writ of certiorari, we reiterate that the decision in the present case conflicts with decisions of other courts of appeals.

The Fourth Circuit's decision conflicts with the decision of other circuits on the question of whether a state defendant's actions, taken while a case is in district court, may bar the defendant from subsequently asserting the defense of state sovereign immunity. The Fourth Circuit held that a defendant may assert immunity on appeal regardless of its actions in district court. Other circuits have disagreed with this view.

For example, in *Hill*, *supra*, the state defendant answered the plaintiff's complaint and participated in pre-trial proceedings without mentioning sovereign immunity. *See* 179 F.3d at 756. On the opening day of trial, the defendant asserted sovereign immunity for the first time. *See id.* The Ninth Circuit held that the defendant had waived immunity by not asserting it in a timely fashion. *See id.* at 760-63.

Thus, the Ninth Circuit believes that a defendant's actions in district court, including even a mere failure to raise the immunity defense in a timely fashion, may constitute an irrevocable waiver of the defense. The Fourth Circuit, by contrast, permits defendants to raise the immunity defense belatedly notwithstanding their actions in district court, including even their express withdrawal of the defense. The Fourth Circuit's decision therefore conflicts with the decision of the Ninth Circuit.[3]

The Fourth Circuit also relied on Maryland state law in holding that the state's attorneys may not waive the state's sovereign immunity. (App. 7a). Whether a federal court should consider state law in determining whether a state has waived its immunity in the course of litigation is a frequently recurring issue in these waiver cases, and, again, the Fourth Circuit's decision conflicts with those of other circuits. The Tenth Circuit, for example, held that removal of a case to federal court and litigation of the case's merits creates a waiver notwithstanding a state statute expressly declaring state courts to be the exclusive forum for suits against the state. *Sutton*, 173 F.3d at 1235. The Eleventh Circuit held that a state's filing of a proof of claim in bankruptcy waives immunity notwithstanding a provision in the state's constitution allowing waiver only by act of the state's General Assembly, *Burke*, 146 F.3d at 1317-18, although later, in *Lapides*, *supra*, which is currently before this Court, the Eleventh Circuit relied on state

---

[3] The ruling in the present case also conflicts in principle with the decision of the Eighth Circuit in *SDDS*, *supra*. In that case, the court of appeals held that the defendants' litigation of the case in district court constituted a waiver of state sovereign immunity. The Fourth Circuit, in the present case, held that, notwithstanding anything that occurred in district court, state defendants may assert a defense of sovereign immunity on appeal.

law in holding that no waiver occurred.

This Court should grant certiorari to resolve the conflict between the Fourth Circuit's decision in this case and the decisions of the other courts of appeals cited above.

C. The Court of Appeals' Ruling is Incorrect

The correct rule is that defendants who waive the defense of state sovereign immunity may not assert the defense later. This was the traditional rule applied by this Court well into the twentieth century. Although the rule was temporarily displaced by cases such as *Edelman v. Jordan*, 415 U.S. 651 (1974), it was effectively reinstated by the recent decision in *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381 (1998). The rule makes good sense; it preserves state sovereign immunity and requires only that the states assert their immunity in an orderly fashion. The conduct of the respondents in this case falls within the rule and bars them from reasserting immunity.

1. This Court's traditional Eleventh Amendment jurisprudence provided that a defendant wishing to assert the defense of state sovereign immunity had to do so in a timely fashion. If the defense was not asserted seasonably, it was waived; once waived, the defense could not be asserted.

Richardson v. Fajardo Sugar Co., 241 U.S. 44 (1916), provides a clear example of this rule. In that case, the plaintiff sought a refund of an allegedly illegal tax, which it had paid under protest to the treasurer of Puerto Rico.[4] Plaintiff sued the

---

[4]Puerto Rico is treated as a state for Eleventh Amendment purposes. *See Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 142 n.1 (1993) (assuming this point *arguendo*); *Ramirez v. Puerto Rico Fire Service*, 715 F.2d 694, 697 (1st Cir. 1983) (so holding); *see also People of Porto Rico v. Rosaly*, 227 U.S. 270, 273 (1913) ("Porto Rico is of such nature as to come within the general rule exempting a government sovereign in its attributes from being sued without its consent.").

treasurer in federal court. The defendant answered the complaint, and some other steps were also taken: an amended and supplemental complaint were filed and answered, and a trial date was set. *See id.* at 46-47. Then, eight months after the action was first instituted, the defendant moved to dismiss on the ground that the court lacked jurisdiction because of the defendant's sovereign status. *Id.* at 47.

Even though the defendant had never expressly disavowed immunity, and even though the defendant attempted to assert immunity just eight months into the case, while the case was still in the trial court, this Court briskly denied the defendant's assertion of immunity as untimely. The Court said: "Whatever might have been the merit of [defendant's] position if promptly asserted and adhered to, we hold . . . that having solemnly appeared and taken the other steps above narrated, [defendant] could not thereafter deny the court's jurisdiction." *Id.* at 47. *Richardson* therefore shows that the traditional waiver rule was quite strong.

Richardson relied on the earlier case of *People of Porto Rico v. Ramos*, 232 U.S. 627 (1914), in which Puerto Rico first intervened as defendant in a case, but later asserted sovereign immunity from suit. This Court rejected the attempt to raise the immunity defense. It said: "the immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it, and to come in and go out of court at its will, the other party having no right of resistance to either step." *Id.* at 632.

Richardson also relied on *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273 (1906), in which the Court said:

> Although a state may not be sued without its consent, such immunity is a privilege which may be waived; and hence, where a state voluntarily become a party to a cause, and submits its rights for judicial determination, it will be

> bound thereby, and cannot escape the result of its own voluntary act by invoking the prohibitions of the 11th Amendment.

Id. at 284 (citing *Clark v. Barnard*, 108 U.S. 436 (1883)).

Thus, this Court's traditional Eleventh Amendment jurisprudence established that if the defense of state sovereign immunity is not seasonably asserted, it is waived and cannot be asserted later. This rule applied well into the twentieth century. *See Sao Vicente v. Transportes Maritimos do Estado*, 281 F. 111, 115 (2d Cir. 1922) ("The underlying principle of *Clark v. Barnard* has been consistently followed."), *cert. dismissed*, 260 U.S. 151 (1922); *Hill, supra*, 179 F.3d at 760 ("Before 1945, it was generally acknowledged that a state waives its Eleventh Amendment immunity by litigating a case on the merits without timely objecting to the federal court's assertion of jurisdiction.").

2. Some later cases, most notably *Edelman v. Jordan*, 415 U.S. 651 (1974), and *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459 (1945), temporarily led to the implementation of a rule that a defendant could assert the defense of state sovereign immunity at any stage of a litigation, on the theory that the defense went to a federal court's subject matter jurisdiction. *See Edelman*, 415 U.S. at 677-78. This theory, however, has been vitiated by this Court's recent decision in *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381 (1998). *Schacht* took a different view of the Eleventh Amendment. The Court said: "The Eleventh Amendment . . . does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense." *Id.* at 389. Justice Kennedy, in a concurring opinion, expressed doubts about the propriety of permitting states to assert Eleventh Amendment immunity at

any time and suggested that the Court could eliminate unfairness by making Eleventh Amendment jurisprudence "more consistent with our practice regarding personal jurisdiction." *Id.* at 394-95 (Kennedy, J., concurring).

As subsequent lower court decisions have confirmed, *Schacht*'s view of the Eleventh Amendment is incompatible with the view that Eleventh Amendment immunity destroys federal subject matter jurisdiction and may, therefore, be asserted at any time. Rather, *Schacht* reinstates the traditional view of Eleventh Amendment immunity as a defense that a state may choose to assert or not. It therefore follows that *Schacht* reinstates the traditional rule that Eleventh Amendment immunity is waived if it is not seasonably asserted, and cannot be asserted once waived. As the Ninth Circuit observed in *Hill*, *supra*, *Schacht* shows that this Court has "returned to its original understanding of Eleventh Amendment immunity," 179 F.3d at 760, and "[o]nce it is clear that the Eleventh Amendment is not a true limitation upon the court's subject matter jurisdiction, but rather a personal privilege that a state may waive, it is difficult to justify or explain a rule that allows this defense to be invoked at any time in the proceedings." *Id.*

State sovereign immunity should, therefore, be treated as an affirmative defense that is akin to the defense of personal jurisdiction. *See Schacht*, 524 U.S. at 394-95 (Kennedy, J., concurring); *see also Hill*, 179 F.3d at 760; *Branson School Dist. RE-82 v. Romer*, 161 F.3d 619, 631 (10th Cir. 1998). Again, this rule is simply the reinstatement of this Court's traditional view.

3. This rule makes good sense. Permitting defendants to assert sovereign immunity belatedly—or, even worse, permitting them to withdraw the defense expressly, only to reassert it later, as in this case—is obviously unfair, unjust, and unworthy of sovereign dignity. Permitting such behavior allows defendants to seek the benefit of a favorable judgment while

running no risk from any adverse judgment. *See Schacht*, 524 U.S. at 394 (Kennedy, J., concurring). Such gamesmanship also unfairly wastes the plaintiff's resources, as well as federal judicial resources, since courts may be forced to consider questions related to the merits of a case, only to find those questions mooted by a state defendant's belated assertion of immunity. *See Hill*, 179 F.3d at 758; *Newfield House, Inc. v. Massachusetts Dep't of Pub. Welfare*, 651 F.2d 32, 36 n.3 (1st Cir. 1981) (belated assertion of Eleventh Amendment immunity "would if allowed work a virtual fraud on the federal court and opposing litigants").

By contrast, a rule requiring state sovereign immunity to be asserted in a timely fashion imposes no unfair hardship on states. It is in no way incompatible with sovereign dignity or sovereign prerogatives. It leaves states completely free to decline to answer the suit of private individuals. It requires only that states exercise this prerogative in an orderly way that shows a bare minimum of regard for the legitimate interests of the federal judicial system. *See Hill*, 179 F.3d at 763.

4. The actions taken by respondents in this case constituted a waiver of state sovereign immunity and therefore triggered the rule that a defendant that waives immunity cannot assert it later. The respondents first raised sovereign immunity and then took the affirmative step of expressly withdrawing the defense.

Respondents' withdrawal of the immunity defense left the district court with a motion to dismiss Count II of petitioner's complaint solely on the basis of Federal Rule 12(b)(6). Because a district court may act on a motion to dismiss under Rule 12(b)(6) only if it has jurisdiction over the merits of a case, *see Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 88, 93-102 (1998), the respondents, by asking for a 12(b)(6) dismissal and by expressly withdrawing their assertion of immunity, expressly asked the district court to exercise jurisdiction over the merits of the case without regard to the

defense of sovereign immunity. This action shows that the respondents submitted themselves to the jurisdiction of the district court and thus waived their defense of immunity.

A state defendant waives immunity when its "conduct during the litigation clearly manifests acceptance of the federal court's jurisdiction or is otherwise incompatible with an assertion of Eleventh Amendment immunity." *Hill*, 179 F.3d at 759. An express withdrawal of the defense of sovereign immunity is incompatible with an assertion of the defense. Respondents' actions in district court therefore barred the respondents from asserting immunity on appeal.

5. The court of appeals also erred in relying on Maryland state law to hold that the state's attorneys may not waive sovereign immunity on behalf of the state. After this Court's decision in *Schacht*, this point is irrelevant. *Schacht* held that, unless a state defendant affirmatively raises the immunity defense, "a court can ignore it." 524 U.S. at 389. Ignoring the question of state sovereign immunity necessarily entails ignoring any question of whether the state's counsel is competent under state law to waive the defense. *Schacht* therefore demonstrates that the question of whether waiver has occurred is a question of federal law, not state law. *See also id.* at 397 (Kennedy, J., concurring) (stating that, notwithstanding *Ford Motor Co.*, the absence of specific state-law authorization is not an insuperable obstacle to adopting a rule of waiver).

For all these reasons, this Court should grant the writ of certiorari.

II. THE PLEADING ISSUE

Certiorari Should Be Granted So this Court May Determine the Proper Rule for Construction of Complaints Containing Both General and Specific Allegations.

Having incorrectly ruled against the petitioner on the state sovereign immunity issue, the Fourth Circuit erred again on the pleading issue. The court's decision raises an important issue regarding the correct construction of pleadings within the federal system.

In this case, petitioner's complaint adequately states a claim under the FMLA by generally alleging that, upon return from leave under the Act, petitioner was transferred to a new job that was not "the same as or substantially equivalent to" her old job, Complaint, ¶20, and in which her duties were "substantially different from and inferior to her duties and responsibilities in her former position." Complaint, ¶14. The court of appeals ignored these sufficient allegations and ruled that the case was properly dismissed because the complaint also contains specific allegations regarding the differences between petitioner's current and previous jobs that the court believed were insufficient to state a claim under the Act. The court's decision violates the fundamental principle of "notice pleading" and misconceives the rule for construction of a complaint that contains both sufficient general allegations and specific allegations that the court finds insufficient.

The court of appeals also clearly erred in holding that the complaint must be dismissed because Count I of the complaint contains an allegation that the court believed defeated the claim stated in Count II. The federal rules expressly permit a complaint to contain alternative, inconsistent allegations.

A. The Ruling of the Court of Appeals Concerns Important Issues of Federal Law

This Court has long attempted to require the lower courts to follow the "notice pleading" philosophy of the Federal Rules of Civil Procedure. Periodically, the lower courts demonstrate a preference for fact pleading requirements, heightened pleading standards, immediate dismissal of cases in which recovery by the plaintiff simply seems remote, or other deviations from the principle of notice pleading that is the animating spirit of the federal pleading rules. This Court has stepped in to set the lower courts back on the right path. *See, e.g., Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) (rejecting a heightened pleading standard in cases alleging municipal liability under 42 U.S.C. § 1983); *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957) (holding that the rules require only notice pleading and "do not require a claimant to set out in detail the facts upon which he bases his claim").[5] It is essential to the proper implementation of the federal system of civil procedure that the lower courts follow the principle of notice pleading.

The importance of this point is underscored by this Court's grant of certiorari, this Term, in *Swierkiewicz v. Sorema, N.A.*, 122 S. Ct. 23 (2001) (No. 00-1853). In that case, as in this one, the court of appeals affirmed dismissal of an employment-law complaint for failure to state a claim, notwithstanding what it should have recognized as sufficient, general allegations. The

---

[5] *See also Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) ("When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.")

plaintiff in *Swierkiewicz* alleged that his employer fired him because of his age and national origin. The Second Circuit affirmed dismissal of the complaint because it contained no more than "naked assertions" of discrimination. *Swierkiewicz v. Sorema, N.A.*, 2001 WL 246077, **1-2 (2d Cir. 2001). In a further parallel to this case, the court disregarded the plaintiff's general allegation of age discrimination because the specific circumstance pleaded in support of it was, in the court's view, "insufficient as a matter of law to raise an inference of discrimination." *Id.* at **2.

This Court's grant of certiorari suggests that once again the Court may find it necessary to remind the lower courts of the fundamental principle of notice pleading. The Court's decision in *Swierkiewicz* could have a strong influence on the correct decision in this case, if it reiterates that a general allegation is all that a complaint is required to contain, or that such a general allegation may not be ignored because of any supposed insufficiency of more specific, supporting allegations. Therefore, this Court should, at a minimum, hold the present case pending its decision in *Swierkiewicz*. Beyond that, the grant of certiorari in *Swierkiewicz* demonstrates the importance of the question presented by this case and suggests that the Court should grant certiorari.

B. The Decision of the Court of Appeals Conflicts with the Decisions of Other Courts of Appeals

1. The Fourth Circuit's decision to disregard the sufficient, general allegations of petitioner's complaint because of the presence of more specific and, in the court's view, insufficient allegations, conflicts in principle with decisions of other circuits. A good decision embodying the conflict is *American Nurses' Ass'n v. Illinois*, 783 F.2d 716 (7th Cir. 1986).

In *American Nurses*, as in the present case, the complaint contained a general allegation and more specific allegations.

The plaintiffs generally alleged that the defendant intentionally discriminated against female employees in violation of Title VII of the Civil Rights Act of 1964. The complaint also listed certain specific, allegedly discriminatory practices. The district court dismissed the complaint because the specific allegations showed that plaintiffs' case was based on a theory of "comparable worth," which the court found to be not actionable under Title VII. *See id.* at 719, 724-26.

The Seventh Circuit reversed. It observed that plaintiffs' general allegation of intentional discrimination, "standing alone, would be quite enough to state a claim under Title VII." *Id.* at 724. The court acknowledged that "[a] plaintiff who files a long and detailed complaint may plead himself out of court by including factual allegations which if true show that his legal rights were not invaded." *Id.* But, it explained, "a complaint cannot be dismissed merely because it includes invalid claims along with a valid one," *id.* at 724-25, and, in particular,

> the court is not to pounce on the plaintiff and by a crabbed and literal reading of the complaint strain to find that he has pleaded facts which show that his claim is not actionable, and then dismiss the complaint on the merits . . . . A complaint . . . cannot be dismissed just because one of the practices, indeed the principal practice, instanced as [unlawful] . . . is lawful.

Id. at 726-27.

In the present case, the Fourth Circuit "pounced" on the petitioner in just the manner the Seventh Circuit held to be forbidden. The general allegations of petitioner's complaint state a claim under the FMLA. Even assuming *arguendo* that her more specific allegations do not allege any unlawful practice, her complaint should not have been dismissed "merely because it includes invalid claims along with a valid one," or

merely because some of the practices instanced as unlawful are lawful, as the Seventh Circuit held in *American Nurses*.

The decision of the Fourth Circuit therefore conflicts in principle with decisions of circuits that permit a complaint to go forward on the basis of general allegations notwithstanding the failure of specific allegations. *See also Bodine Produce, Inc. v. United Farm Workers Organizing Committee*, 494 F.2d 541, 561-62 (9th Cir. 1974) (so allowing; "The failure of the specific allegations . . . may suggest that the plaintiffs will have difficulty in establishing their case . . . but it by no means establishes that there exists . . . 'some insuperable bar to relief.'"). A decision of the Fifth Circuit suggests that that court may support the Fourth Circuit position. *See Arguello v. Conoco, Inc.*, 207 F.3d 803, 813 (5th Cir. 2000) (affirming Rule 12(b)(6) dismissal of complaint that generally alleged that defendant's practice had disparate racial impact because specific incidents set forth in complaint did not establish any widespread effect on members of minority groups), *cert. denied*, 531 U.S. 874 (2000). In other circuits the point may be unresolved. *See Fleming v. AT&T Information Services, Inc.*, 878 F.2d 1472, 1475 (D.C. Cir. 1989) ("we need not decide whether a complaint making sufficient general allegations may nonetheless be dismissed on the ground that the specific allegations in the complaint do not, by themselves, state a claim upon which relief can be granted").

2. With regard to the problem of the potentially inconsistent allegations in petitioner's complaint, the Fourth Circuit's opinion conflicts in principle with numerous decisions of other circuits. As other courts have specifically held, "[i]n light of the liberal pleading policy embodied in Rule 8(e)(2), ... a pleading should not be construed as an admission against another alternative or inconsistent pleading in the same case...." *Henry v. Daytop Village, Inc.*, 42 F.3d 89, 95 (2d Cir. 1994) (quoting *Molsbergen v. United States*, 757 F.2d 1016, 1018-19

(9th Cir. 1985)) (ellipses in original). Other cases also follow this rule. *See, e.g., Rodriguez-Suris v. Montesinos*, 123 F.3d 10, 20 (1st Cir. 1997) ("Especially at the early stages of litigation, a party's pleading will not be treated as an admission precluding another, inconsistent, pleading."); *Independent Enterprises Inc. v. Pittsburgh Water & Sewer Authority*, 103 F.3d 1165, 1175 (3d Cir. 1997) ("a court may not construe [a plaintiff's] first claim as an admission against another alternative or inconsistent claim") (internal quotation omitted). The Fourth Circuit treated the allegations of Count I of petitioner's complaint as an admission against Count II, which is just what these other courts have held to be forbidden.

C. The Decision of the Court of Appeals is Incorrect.

The FMLA guarantees that, upon return from a protected leave, an employee must be restored to her previous job or to an equivalent job. 29 U.S.C. § 2614(a)(1)(A), (B). The Department of Labor's regulations interpreting the statute provide that equivalent jobs must be "virtually identical . . . in terms of pay, benefits and working conditions, including privileges, perquisites and status" and must "involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority." 29 C.F.R. § 825.215(a).

The court of appeals held that petitioner insufficiently alleged that her current job is not "equivalent" to her previous job. The court's decision is incorrect.

Petitioner's complaint alleges that she took a medical leave in accordance with the FMLA and that upon return from that leave she was given a new job that is not "the same as or substantially equivalent to" her old one, Complaint, ¶20, and in which her "daily activities are substantially different from and inferior to her duties and responsibilities in her former position." Complaint, ¶14. These general allegations plainly suffice to

allege that petitioner's current job is not "equivalent" to her previous job and therefore to state a claim under the FMLA. The complaint puts respondents on fair notice of what petitioner's claim is and the grounds upon which it rests, which is all that the rules require. *See Leatherman, supra*, 507 U.S. at 168. Under the federal rules, there is no requirement that petitioner plead specific details of exactly how her current job fails to be equivalent to her previous job. *See id.* (the federal rules "do not require a claimant to set out in detail the facts upon which he bases his claim").

It is true that petitioner, although not required to do so, did plead some such details. However, there is no suggestion in the complaint that the alleged details exhaust the differences between petitioner's current and previous jobs. Therefore, the specific allegations do not limit the general allegations.

The court of appeals affirmed dismissal of petitioner's complaint because it determined that the specific details contained in the complaint did not state a claim under the FMLA, but amounted only to "de minimis" differences between petitioner's current and previous jobs, which are excluded by regulation from the Act's "equivalence" requirement. (App. 12a). This was error. Even assuming *arguendo* that the alleged details are themselves insufficient to state a claim, the general allegations must also be considered. Because the general allegations are, by themselves, plainly sufficient, the complaint cannot be dismissed under Rule 12(b)(6).[6]

---

[6] In saying this, petitioner does not concede that the specific allegations are insufficient to state a claim. In fact, these allegations reinforce petitioner's claim that her current job is not equivalent to her previous job. The main point, however, is that a complaint containing a sufficient general allegation cannot be dismissed for failure to state a claim simply because a court believes that the complaint's specific allegations are by themselves insufficient.

2. The court of appeals also clearly erred in holding that petitioner's complaint fails to state a claim because it alleges that respondents transferred her to her new position in retaliation for filing a grievance that was unrelated to her FMLA leave. This allegation is contained in the now-abandoned Count I of petitioner's complaint, which presented a different theory of relief. It is true that this allegation may be inconsistent with Count II of the complaint, which alleges a violation of the FMLA. However, the Federal Rules expressly provide that complaints may contain alternative, inconsistent allegations. *See* Fed. R. Civ. P. 8(e)(2). Count II of petitioner's complaint is therefore valid notwithstanding the presence of an alternative, possibly inconsistent allegation in Count I.

Petitioner's use of potentially inconsistent allegations is perfectly appropriate given the circumstances of the case. At this stage of the case, the reason petitioner was demoted is best known to the respondents. Petitioner is entitled to use the discovery process to learn the truth of the matter, and she is entitled to assert every theory upon which she could get relief, regardless of consistency. The court of appeals erred in holding her complaint invalid because of the possible inconsistency between the two counts of the complaint.

This Court should grant certiorari on the pleading issue. A correct ruling on this issue would permit at least part of petitioner's case to proceed regardless of the outcome on the immunity issue, because, as the court of appeals held, immunity does not bar petitioner's claim against the individual respondents for injunctive relief.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be held pending the Court's disposition of *Lapides* and *Swierkiewicz* and then disposed of appropriately in light of the result in those cases.

Respectfully submitted,

DEBORAH A. JEON
American Civil Liberties Union Foundation of Maryland
100 North Liberty Street
Centreville, MD 21617
(410) 758-1975

ROBIN R. COCKEY
Cockey, Brennan & Maloney, P.C.
116 W. Main Street
Salisbury, MD 21801
(410) 546-1750

JONATHAN R. SIEGEL
Counsel of Record
Professor of Law
George Washington University Law School
2000 H St., N.W.
Washington, DC 20052
(202) 994-7453

JANUARY 2002

CONTENTS OF APPENDIX

Page

APPENDIX A:

Opinion of the Court of Appeals (Sept. 26, 2001) 1a

APPENDIX B:

Opinion and Order of the District Court (July 25, 2000) 15a

APPENDIX C:

Order of the Court of Appeals Denying Rehearing (Oct. 23, 2001) 19a

APPENDIX D:

Constitutional, Statutory, and Regulatory Provisions Involved 20a

APPENDIX E:

Letter Withdrawing Immunity Defense (July 11, 2000) 32a

APPENDIX F:

Letter Reasserting Immunity Defense (May 9, 2001) 33a

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

SHEILA K. MONTGOMERY,
Plaintiff-Appellant,

No. 00-2099

v.

THE STATE OF MARYLAND;
DEPARTMENT OF PUBLIC SAFETY AND
CORRECTIONAL SERVICES, Division of Corrections;
ROBERT KUPEC, Warden;
GEORGE KALOROUMAKIS, Assistant Warden,
Defendants-Appellees.

UNITED STATES OF AMERICA,
Amicus Curiae.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Frederic N. Smalkin, District Judge.
(CA-00-1019)

Argued: May 8, 2001

Decided: September 26, 2001

Before WILKINSON, Chief Judge, and WILKINS and
LUTTIG, Circuit Judges.

Affirmed by published opinion. Chief Judge Wilkinson wrote the opinion, in which Judge Wilkins and Judge Luttig joined.

COUNSEL

ARGUED: Jonathan Richard Siegel, GEORGE WASHINGTON UNIVERSITY SCHOOL OF LAW, Washington, D.C., for Appellant. Alisa Beth Klein, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus Curiae. Andrew Howard Baida, Solicitor General, Baltimore, Maryland, for Appellees. ON BRIEF: Deborah A. Jeon, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MARYLAND, Centreville, Maryland; Robin R. Cockey, COCKEY, BRENNAN & MALONEY, Salisbury, Maryland, for Appellant. David W. Ogden, Assistant Attorney General, Lynne A. Battaglia, United States Attorney, Mark B. Stern, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus Curiae. J. Joseph Curran, Jr., Attorney General of Maryland, Scott S. Oakley, Assistant Attorney General, Amanda S. La Forge, Staff Attorney, Baltimore, Maryland, for Appellees.

OPINION

WILKINSON, Chief Judge:

This case requires us to decide whether the district court properly dismissed plaintiff's suit on sovereign immunity grounds. We affirm the dismissal, but for reasons different from the district court.

I.

Plaintiff Sheila Montgomery worked as an administrative aide to the Warden of Maryland's Eastern Correctional Institute (ECI). In September 1999, Montgomery took extended leave under the Family Medical Leave Act (FMLA) to have a scheduled surgical procedure. During her absence, Montgomery was reassigned to a position as a secretary in the maintenance department. It is undisputed that this new assignment kept her at the same pay grade and increment level within the Maryland State Personnel Management System. It is also undisputed that Montgomery suffered no loss of benefits. Montgomery, however, felt that this transfer amounted to a retaliatory demotion in response to her having taken FMLA leave. She filed suit against the State of Maryland, ECI Warden Robert Kupec, and ECI Assistant Warden George Kaloroumakis. Kupec and Kaloroumakis were sued in both their individual and official capacities.

In response to Montgomery's suit, Maryland filed a motion to dismiss. At first, the state argued both that sovereign immunity barred Montgomery's suit and that Montgomery had failed to state a claim because she was returned to an equivalent position. Before Montgomery replied, however, Maryland withdrew the Eleventh Amendment defense on behalf of all defendants.

Notwithstanding Maryland's withdrawal of the argument, the district court, sua sponte, dismissed Montgomery's suit on sovereign immunity grounds. Noting its "duty not to enforce unconstitutional statutes," the court held that the FMLA did not abrogate Maryland's sovereign immunity. The district court also held that the state's withdrawal of the sovereign immunity defense did not amount to giving consent to be sued in federal court. The court dismissed the complaint against all defendants. Montgomery then filed this appeal.

II.

A.

We first ask whether the district court erred in deciding the sovereign immunity question. In Wisconsin Department of Corrections v. Schacht, 524 U.S. 381 (1998), the Supreme Court discussed whether the Eleventh Amendment defense is one that courts must always address, even sua sponte. In that case, the Court considered whether the presence of one claim subject to Eleventh Amendment immunity deprived the district court of removal jurisdiction over the entire suit or whether federal jurisdiction survived with respect to the remaining claims. Id. at 386. Holding that the presence of a claim barred by the Eleventh Amendment does not destroy removal jurisdiction over the entire suit, the Court noted that the Eleventh Amendment "does not automatically destroy original jurisdiction" because the "State can waive the defense." Id. at 389. Accordingly, the Court reasoned that a district court need not "raise the defect on its own" and that "[u]nless the State raises the matter [i.e., the defense of sovereign immunity], a court can ignore it." Id.

The district court failed to recognize the discretion afforded it by Schacht. To the contrary, the court explained its sua sponte consideration of the Eleventh Amendment issue as being required by its "duty not to enforce unconstitutional statutes." The court would have been well advised, however, not to take up the Eleventh Amendment defense. When a state clearly contemplates the defense of sovereign immunity and then affirmatively and unequivocally decides to withdraw that argument, a district court errs in considering the issue sua sponte. This is true regardless of how the court ultimately rules. The Eleventh Amendment reflects the principle that in a federal

system with dual sovereigns, one sovereign must treat the other with a measure of respect. See South Carolina State Ports Authority v. Federal Maritime Commission, 243 F.3d 165, 172 (4th Cir. 2001) ("dual sovereignty posits a relationship of mutual respect "). This goal is undermined when a federal court imposes on a state a legal argument that the state first advanced but then affirmatively withdrew.[1]

B.

In the appeal before this court, the State of Maryland reversed course and decided to aggressively invoke the defense of sovereign immunity. When asked at oral argument, counsel for the state unequivocally stated that Maryland was invoking its sovereign immunity as a defense to Montgomery's suit. This assertion was followed by a letter which confirmed, for the record, that "the State appellees assert that the Eleventh Amendment bars the plaintiff's claim filed under the Family Medical Leave Act." Because Maryland has pursued in this litigation what might be described as an erratic approach to its own Eleventh Amendment defense, we address whether this court has the discretion to consider Maryland's assertion of immunity even though the Attorney General attempted to withdraw it below. We conclude that we do have discretion, and

---

[1]We do not, of course, address the propriety of sua sponte consideration of Eleventh Amendment defenses which the state has not raised. See, e.g., Higgins v. Mississippi, 217 F.3d 951, 954 (7th Cir. 2000) (affirming the dismissal of a pro se prisoner suit on Eleventh Amendment grounds, even though the state did not respond, because doing so protected the state from frivolous federal litigation and served the "interest in maintaining harmonious relations between the states and the federal government") (internal quotations omitted). Such a situation does not reflect the same affront to state prerogatives as consideration of a defense which the state has affirmatively and unequivocally withdrawn.

that there is a substantial difference between consideration of an Eleventh Amendment defense in the face of an affirmative withdrawal and consideration of the defense in the face of an emphatic assertion of the immunity.

It is axiomatic "that the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court." Edelman v. Jordan, 415 U.S. 651, 678 (1974). As the Supreme Court has explained, "[t]he Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court." Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 467 (1945).

Further, circuit precedent allows the Eleventh Amendment to be raised for the first time on appeal, regardless of whether the case was resolved on the pleadings, see Suarez Corp. Indus. v. McGraw, 125 F.3d 222 (4th Cir. 1997), or upon a grant of summary judgment, see In re Creative Goldsmiths, Inc., 119 F.3d 1140 (4th Cir. 1997). Indeed, a rule that prevented an appellate court from considering the defense sua sponte would impair the important sovereign interest that the Eleventh Amendment protects. Thus, the fact that Maryland did not assert the immunity defense below does not preclude the state from asserting it now.

Montgomery contends, however, that Maryland's conduct before the district court amounted to a waiver of the sovereign immunity defense. It is undisputed that the defense of sovereign immunity can be waived. See South Carolina Ports, 243 F.3d at 170. And Montgomery claims that by withdrawing the sovereign immunity argument from its motion to dismiss, Maryland waived the defense.

Under Maryland law, however, the Attorney General may not dispositively waive the defense of sovereign immunity on behalf of the state. In Linkenhoker v. Weinberger, 529 F.2d 51 (4th Cir. 1975), this court held that "[s]ince the Maryland courts and legislature have been so explicit in denying the attorney general the power to consent to suits against the state in its own courts, a fortiori he may not consent to suits against the state in federal court which would otherwise be barred by the eleventh amendment." Id. at 54.

Linkenhoker explicitly relied on Maryland law because in Ford, the Supreme Court held that whether executive officers of a state have validly waived the defense of sovereign immunity is determined by looking at "their power under state law to do so." Ford, 323 U.S. at 467. As Linkenhoker acknowledged, the Maryland courts have already resolved this issue of state law. Indeed, in Brohawn & Bros. v. Board of Trustees, 304 A.2d 819 (Md. 1973), Maryland's highest court unequivocally stated that "neither counsel for the State nor any of its agencies may, either by affirmative action or by failure to plead the defense, waive the defense of governmental immunity." Id. at 820 (internal quotations omitted). Rather, suits against the state of Maryland can proceed only "where specific legislative authority" has been given and where the legislature has allocated funds "for the satisfaction of the judgment." Id. It is undisputed that Maryland's legislature has not authorized FMLA suits against the state nor has it allocated funds to satisfy FMLA judgments.

Montgomery acknowledges our holding in Linkenhoker and the underlying Brohawn decision, but claims that these cases have been superseded by subsequent legislative and judicial pronouncements. However, as the United States recognizes in its amicus brief, we relied upon Linkenhoker just four years ago for the proposition that "the Attorney General of Maryland lacks

the authority to waive Eleventh Amendment immunity on behalf of the state and its officials." Booth v. Maryland, 112 F.3d 139, 145 n.2 (4th Cir. 1997). And in In re Creative Goldsmiths, this court, examining current Maryland law, held that "[u]nder state law, in Maryland's own courts, `a waiver of sovereign or governmental immunity from suit generally requires that two conditions be met.'" 119 F.3d at 1149 (quoting Kee v. State High-way Administration, 545 A.2d 1312, 1317 (1988)). "`First the Legislature must authorize suits for damages and second, there must be provision for the payment of judgments.'" Id. (quoting Kee, 545 A.2d at 1317). As neither condition has been met, under Maryland law an attempt by the Attorney General to waive sovereign immunity in this case cannot be binding on the state.

A failure to address the assertion of immunity would be inappropriate on several fronts. First, there is the important interest of not having private individuals impose a levy on state treasuries without any consent by the state itself. Secondly, there is a risk of judicially enforcing a private right of action which may rest upon an invalid exercise of Congressional authority. Third, Maryland now quite explicitly asserts the Eleventh Amendment defense. Just as it might constitute a disregard of a state's sovereign prerogative to entertain the defense in the face of an unequivocal withdrawal of immunity, so too might we abridge state sovereignty by failing to respect a claim of immunity in the face of the state's unequivocal assertion of it.

III.

Montgomery asserts claims against the State of Maryland, as well as against Warden Robert Kupec and Assistant Warden George Kaloroumakis in both their official and individual

capacities. With one exception, the Eleventh Amendment bars all these claims.

A.

First, Montgomery's claims against the state are barred by the Eleventh Amendment. The Eleventh Amendment bars private suits against unconsenting states unless Congress can validly abrogate a state's Eleventh Amendment immunity. See Alden v. Maine, 527 U.S. 706, 755-57 (1999); South Carolina Ports, 243 F.3d at 176-77. In this case, the suit against the state itself may proceed only if Congress properly enacted the FMLA pursuant to its Fourteenth Amendment, § 5 power. See Lizzi v. Alexander, 255 F.3d 128, 134-36 (4th Cir. 2001). In Lizzi, we specifically noted that the FMLA is not "congruent and proportional to the identified Fourteenth Amendment violation -- employment discrimination on the basis of sex." Id. at 134. Consequently, the FMLA "is not a valid abrogation of a state's Eleventh Amendment immunity from suit." Id. at 135. In arriving at this conclusion, this court became the seventh federal court of appeals to hold that the FMLA does not abrogate the sovereign immunity of the states. See, e.g., Townsel v. Missouri, 233 F.3d 1094, 1095 (8th Cir. 2000); Chittister v. Department of Cmty. & Econ. Dev., 226 F.3d 223, 228 (3d Cir. 2000); Kazmier v. Widmann, 225 F.3d 519, 526 (5th Cir. 2000); Sims v. University of Cincinnati, 219 F.3d 559, 566 (6th Cir. 2000); Hale v. Mann, 219 F.3d 61, 69 (2d Cir. 2000); Garrett v. University of Ala., 193 F.3d 1214, 1219 (11th Cir. 1999), rev'd on other grounds sub nom. Board of Trustees v. Garrett, 121 S. Ct. 955, 961, 968 (2000). Because the FMLA does not validly abrogate Maryland's Eleventh Amendment immunity, the claims against the state must be dismissed.

Second, the Eleventh Amendment bars Montgomery's claims

against Kupec and Kaloroumakis for retroactive relief in their official capacities. "The Eleventh Amendment bars a suit against state officials when `the state is the real, substantial party in interest.'" Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 101 (1984) (quoting Ford, 323 U.S. at 464). Whether the claim be legal or equitable in nature, a private plaintiff cannot receive retrospective relief from state officers sued in their official capacities. See Edelman v. Jordan, 415 U.S. at 666-69; Lizzi, 255 F.3d at 136. Thus the Eleventh Amendment bars suits by private plaintiffs for backpay and other forms of retroactive relief that are in reality claims against the state itself. See Pennhurst, 465 U.S. at 101, n.11; Edelman, 415 U.S. at 666-69. These types of actions can only be official capacity suits. Consequently, Montgomery's claims against the individual supervisors in their official capacities for retroactive relief must be dismissed.

Third, Montgomery's claims against Kupec and Kaloroumakis in their individual capacities must be dismissed as well. Normally, of course, the Eleventh Amendment does not bar claims by private plaintiffs against individual officers in their individual capacities. See Hafer v. Melo, 502 U.S. 21, 28-29 (1991). But this court has recently held in Lizzi that the state is the real party in interest when an official is sued for damages for official acts under the FMLA. Lizzi, 255 F.3d at 136-38. We based this conclusion in large part on the fact that private plaintiffs "would easily be able to evade the Eleventh Amendment prohibition against suing a state merely by naming the individual supervisor as the employer." Id. at 137. A rule permitting this would undermine recent Supreme Court decisions such as Board of Trustees of the University of Alabama v. Garrett, 121 S. Ct. 955 (2001), Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), and Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996). Lizzi, 255 F.3d at 137-38.

Indeed, the Seventh Circuit is in accord with our holding in Lizzi that if a statute treats an individual state employee as the employer, the real party in interest is in reality the state itself. See Luder v. Endicott, 253 F.3d 1020, 1022-23 (7th Cir. 2001) ("[A] suit nominally against state employees in their individual capacities that demonstrably has the identical effect as a suit against the state is, we think, barred. Any other position would be completely unrealistic and would make a mockery of the Supreme Court's heightened sensitivity to state prerogatives."). In this case, Montgomery's FMLA claims against the supervisors in their individual capacities make clear "that the state is the real party in interest." Lizzi, 255 F.3d at 136. Thus, the state's Eleventh Amendment immunity transfers to these individual capacity claims as well.

Moreover, even if Montgomery's claim for damages could somehow survive the sovereign immunity defense, dismissal would still be proper because she has failed to state a claim upon which relief can be granted. The damages provision of the FMLA limits recovery to "any wages, salary, employment benefits, or other compensation denied or lost" on account of the violation. 29 U.S.C. § 2617(a)(1)(A)(i)(I). In the event that no wages, salary, or other compensation are lost, damages are limited to "any actual monetary losses sustained by the employee . . . such as the cost of providing care." Id. § 2617(a)(1)(A)(i)(II).

Montgomery has not alleged that she suffered actual monetary damages, either in lost wages or in the cost of providing care. Rather, her demand for monetary relief appears to be rooted solely in her claim for emotional damages. The FMLA text nowhere provides, however, for recovery of damages for emotional distress. See Settle v. S.W. Rodgers, Co., 998 F. Supp. 657, 665-66 (E.D. Va. 1998), aff'd 182 F.3d 909 (4th Cir.

1999). Thus, Montgomery's suit for damages against Kupec and Kaloroumakis was properly dismissed even absent the Eleventh Amendment bar.

B.

The only remaining claim against the individual supervisors in their official capacities is Montgomery's claim for reinstatement to her former position. This claim can proceed because Montgomery's complaint alleges an ongoing violation of federal law. See Ex parte Young, 209 U.S. 123 (1908); Edelman, 415 U.S. at 664; South Carolina Ports, 243 F.3d at 170. The FMLA requires employers to restore an employee returning from FMLA leave to either the same position or "an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." 29 U.S.C. § 2614(a)(1)(A)-(B). The regulation defining an equivalent position focuses on the factors of equivalent pay, equivalent benefits, and equivalent terms and conditions of employment. 29 C.F.R. § 825.215 (2000). Equivalent terms and conditions of employment, however, do not require equivalence with respect to "the de minimis or intangible, unmeasurable aspects of the job." Id. at §§§ 825.215(f).

Montgomery's complaint focuses on precisely the sorts of de minimis, intangible, and unmeasurable aspects of a job that the regulations specifically exclude. For example, she contends that her duties formerly were "truly administrative," but now are "the simplest, most menial of clerical functions: answering the phone, taking messages, typing simple correspondence, and the like." Moreover, she claims that while she used to have "her own work area," now she must work in a "room shared with another employee." Finally, she contends that she has diminished job security.

Montgomery concedes, however, that her pay grade and increment level remained the same. The record reflects that both before and after her leave, Montgomery was classified as an "Administrative Aide Stenographer" by the Maryland State Personnel Management System. She also received a four percent raise within two months of being transferred. And since Montgomery's transfer did not require a change in classification, she has not lost any job security. Cf. Hampton v. Univ. of Md., 674 A.2d 145, 150 (Md. App. 1996). As the Executive Director of the Human Resources Services Division of the Department of Public Safety and Correctional Services explained:

> Ms. Montgomery is no more, and no less, subject to adverse action by the Maryland State Personnel Management System now, as assigned to the Maintenance Department at ECI, than she was when she was formerly assigned to the Warden's office at ECI. Her employment rights within the [system] . . . have not changed with her reassignment from the Warden's office to the Maintenance Department.

Montgomery's other complaints, such as the alleged reduction in the complexity of her tasks and the sharing of work space, also fall within the excluded de minimis category. The difference between "truly administrative" tasks and "answering the phone, taking messages, typing simple correspondence, and the like" is not of sufficient magnitude, especially given the equivalent pay grade, increment level, and administrative classification, to constitute an FMLA violation. And the difference between having one's own work space and having to share space with one other person is not of such import as to implicate the protections of the governing federal law. In sum,

Montgomery's claim for reinstatement was properly dismissed.[2]

IV.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

---

[2]Montgomery is likewise not entitled to injunctive relief because her complaint demonstrates that her change in status was not related to her assertion of her rights under the Family and Medical Leave Act. According to her own summary of her complaint, the Defendants transferred her "to retaliate against her for filing a grievance and otherwise complaining of her work conditions." As it is evident that Montgomery would have been transferred even if she had not taken medical leave, she has no right to be returned to her pre-leave position. See 29 C.F.R. §§ 825.216(a), 825.312(d) (2000)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SHEILA K. MONTGOMERY

v. CIVIL NO. S 00-1019

STATE OF MARYLAND
DEPARTMENT OF PUBLIC SAFETY
AND CORRECTIONAL SERVICES
WARDEN ROBERT KUPEC
DEPUTY WARDEN GEORGE
KALOROUMAKIS

MEMORANDUM OPINION

Upon review of the defendants' motion to dismiss, and the plaintiff's opposition thereto, the motion will be granted, for the reasons that follow. No further briefing or oral hearing is needed. Local Rule 105.6, D. Md.

Although the defendants have withdrawn that portion of their motion to dismiss arguing that the Family and Medical Leave Act (FMLA) cannot be applied to the states under the Eleventh Amendment, the Court has a duty not to enforce unconstitutional statutes. The FMLA, as applied to the states, is clearly unconstitutional under the Eleventh Amendment, because it allows the states to be sued in a federal court without their consent, in the absence of a constitutionally-adequate abrogation of that immunity by Congress. Very recent case law persuasively states the reasoning supporting this conclusion, which the Court need not repeat here. *See, e.g, Sims v. University of Cincinnati*, ___ F. 3d ___, 2000 WL 973501 (6th

Cir. Jul. 17, 2000). Certainly, the defendants' withdrawal of part of their motion to dismiss does not amount to a constitutionally significant consent to suit or other waiver of sovereign immunity by the State of Maryland under the Eleventh Amendment. Therefore, this Court has no subject matter jurisdiction over the FMLA count -- Count II -- of the plaintiff's complaint.

Count I of the plaintiff's complaint claims a violation of the Due Process Clause. It asserts jurisdiction under 42 U.S.C. § 1983. To the extent that the plaintiff names the State of Maryland or its agencies as a defendant on that count, she fails to state a claim. To the extent that she presses her claim individually against defendants Kupec and Kaloroumakis, the complaint fails to state a claim under Fed. R. Civ. P. 12 (b) (6), and may be dismissed accordingly. The reason it fails to state a claim is that there is no protected liberty interest in retention of precisely the same terms and conditions of employment following return medical leave as before, nor is there *per se* any protected liberty interest in being free of "retaliation," in the absence of a public employee's exercise of a specific constitutional right, which medical leave is not. The plaintiff's job title, pay grade, and increment level stayed the same in her new job as a secretary in the maintenance department as when she was a secretary in the warden's office. Only did her duties change.

Even under Title VII, mere changes in working conditions or perceptions about a job's duties or status -- whether plaintiff's perceptions or anyone else's -- are not considered adverse employment actions that can form the basis for suit. *See Page v. Bolger*, 645 F.2d 227 (4th Cir. 1981), *cert. denied*, 454 U.S. 892 (1982). It follows, therefore, that there should be no protected liberty interest in such conditions of employment, so long as the job employee's right to continue at the same level of pay and benefits is preserved, as here.

Even if there were a protected liberty interest, there is no showing that the defendants had a federal constitutional duty to provide the plaintiff with notice or hearing before assignment to the new job. Thus, there is no sufficient showing of any violation of a constitutional right to support an action under Section 1983, and Count I will be dismissed for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12 (b) (6).

Because the State of Maryland apparently remains amenable to suit in state court under the FMLA, *see Sims, supra,* slip op. at 15, Count II will be dismissed for lack of federal subject matter jurisdiction, without prejudice whereas Count I will be dismissed for failure to state a claim under Fed. R. Civ. P. 12 (b) (6), all by a separate Order to be entered herein.

/s/ Frederic N. Smalkin
United States District Judge

Dated: /s/ July 25, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SHEILA K. MONTGOMERY

v. CIVIL NO. S 00-1019

STATE OF MARYLAND
DEPARTMENT OF PUBLIC SAFETY
AND CORRECTIONAL SERVICES
WARDEN ROBERT KUPEC
DEPUTY WARDEN GEORGE
KALOROUMAKIS

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is, this 25th day of July, 2000, by the Court, ORDERED:

1. That defendants' motion to dismiss Count I, BE, and it hereby IS, GRANTED, for failure to state a claim under Fed. R. Civ. P. 12 (b) (6);

2. That defendants' motion to dismiss Count II, BE, and it hereby IS, GRANTED, without prejudice, for lack of federal subject matter jurisdiction;

3. That this case BE, and it hereby IS, CLOSED; and

4. That the Clerk of Court mail copies hereof to counsel for the parties.

/s/ Frederic N. Smalkin
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 23, 2001

No. 00-2099
CA-00-1019

SHEILA K. MONTGOMERY
Plaintiff - Appellant

v.

THE STATE OF MARYLAND; DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES; Division of Corrections; ROBERT KUPEC, Warden; GEORGE KALOROUMAKIS, Assistant Warden
Defendants - Appellees

UNITED STATES OF AMERICA
Amicus Curiae

ORDER

Appellant has filed a petition for rehearing.
The Court denies the petition for rehearing.

For the Court,
/s/ Patricia S. Connor
CLERK

APPENDIX D

U.S. Const.: Amend. XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.

§ 2612. Leave requirement

(a) In general.

(1) Entitlement to leave. Subject to section 103 [29 USCS § 2613], an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(2) Expiration of entitlement. The entitlement to leave

under subparagraphs (A) and (B) of paragraph (1) for a birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

§ 2614. Employment and benefits protection

(a) Restoration to position.

(1) In general. Except as provided in subsection (b), any eligible employee who takes leave under section 102 [29 USCS § 2612] for the intended purpose of the leave shall be entitled, on return from such leave--

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(2) Loss of benefits. The taking of leave under section 102 [29 USCS § 2612] shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

(3) Limitations. Nothing in this section shall be construed to entitle any restored employee to--

(A) the accrual of any seniority or employment benefits during any period of leave; or

(B) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

(4) Certification. As a condition of restoration under paragraph (1) for an employee who has taken leave under section 102(a)(1)(D) [29 USCS §

2612(a)(1)(D)], the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

(5) Construction. Nothing in this subsection shall be construed to prohibit an employer from requiring an employee on leave under section 102 [29 USCS § 2612] to report periodically to the employer on the status and intention of the employee to return to work.

§ 2615. Prohibited acts

(a) Interference with rights.

(1) Exercise of rights. It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this title [29 USCS §§ 2611 et seq.].

(2) Discrimination. It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this title [29 USCS §§ 2611 et seq.].

§ 2617. Enforcement

(a) Civil action by employees.

(1) Liability. Any employer who violates section 105 [29 USCS § 2615] shall be liable to any eligible employee affected--

(A) for damages equal to--

(i) the amount of--

(I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or

(II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary for the employee;

(ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and

(iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer who has violated section 105 [29 USCS § 2615] proves to the satisfaction of the court that the act or omission which violated section 105 [29 USCS § 2615] was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 105 [29 USCS § 2615], such court may, in the discretion of the court, reduce the amount of the

liability to the amount and interest determined under clauses (i) and (ii), respectively; and

(B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(2) Right of action. An action to recover the damages or equitable relief prescribed in paragraph (1) may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of--

(A) the employees; or

(B) the employees and other employees similarly situated.

(3) Fees and costs. The court in such an action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant.

(4) Limitations. The right provided by paragraph (2) to bring an action by or on behalf of any employee shall terminate--

(A) on the filing of a complaint by the Secretary in an action under subsection (d) in which restraint is sought of any further delay in the payment of the amount described in paragraph (1)(A) to such employee by an employer responsible under paragraph (1) for the payment; or

(B) on the filing of a complaint by the Secretary in an action under subsection (b) in which a recovery is sought of the damages described in paragraph (1)(A) owing to an

eligible employee by an employer liable under paragraph (1), unless the action described in subparagraph (A) or (B) is dismissed without prejudice on motion of the Secretary.

Department of Labor regulations,
29 C.F.R. § 825 et seq.

29 C.F.R. § 825.215

What is an equivalent position?

(a) An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

(b) If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, fly a minimum number of hours, etc., as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon return to work.

(c) Equivalent Pay.

(1) An employee is entitled to any unconditional pay increases which may have occurred during the FMLA leave period, such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed would not have to be granted unless it is the employer's policy or practice to do so with respect to other employees on "leave without pay." In such case, any pay increase would be

granted based on the employee's seniority, length of service, work performed, etc., excluding the period of unpaid FMLA leave. An employee is entitled to be restored to a position with the same or equivalent pay premiums, such as a shift differential. If an employee departed from a position averaging ten hours of overtime (and corresponding overtime pay) each week, an employee is ordinarily entitled to such a position on return from FMLA leave.

(2) Many employers pay bonuses in different forms to employees for job-related performance such as for perfect attendance, safety (absence of injuries or accidents on the job) and exceeding production goals. Bonuses for perfect attendance and safety do not require performance by the employee but rather contemplate the absence of occurrences. To the extent an employee who takes FMLA leave had met all the requirements for either or both of these bonuses before FMLA leave began, the employee is entitled to continue this entitlement upon return from FMLA leave, that is, the employee may not be disqualified for the bonus(es) for the taking of FMLA leave. See § 825.220 (b) and (c). A monthly production bonus, on the other hand does require performance by the employee. If the employee is on FMLA leave during any part of the period for which the bonus is computed, the employee is entitled to the same consideration for the bonus as other employees on paid or unpaid leave (as appropriate). See paragraph (d)(2) of this section.

(d) Equivalent Benefits. "Benefits" include all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability

insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer through an employee benefit plan as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3).

(1) At the end of an employee's FMLA leave, benefits must be resumed in the same manner and at the same levels as provided when the leave began, and subject to any changes in benefit levels that may have taken place during the period of FMLA leave affecting the entire workforce, unless otherwise elected by the employee. Upon return from FMLA leave, an employee cannot be required to requalify for any benefits the employee enjoyed before FMLA leave began (including family or dependent coverages). For example, if an employee was covered by a life insurance policy before taking leave but is not covered or coverage lapses during the period of unpaid FMLA leave, the employee cannot be required to meet any qualifications, such as taking a physical examination, in order to requalify for life insurance upon return from leave. Accordingly, some employers may find it necessary to modify life insurance and other benefits programs in order to restore employees to equivalent benefits upon return from FMLA leave, make arrangements for continued payment of costs to maintain such benefits during unpaid FMLA leave, or pay these costs subject to recovery from the employee on return from leave. See § 825.213(b).

(2) An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began, however, (e.g., paid vacation, sick or personal

leave to the extent not substituted for FMLA leave) must be available to an employee upon return from leave.

(3) If, while on unpaid FMLA leave, an employee desires to continue life insurance, disability insurance, or other types of benefits for which he or she typically pays, the employer is required to follow established policies or practices for continuing such benefits for other instances of leave without pay. If the employer has no established policy, the employee and the employer are encouraged to agree upon arrangements before FMLA leave begins.

(4) With respect to pension and other retirement plans, any period of unpaid FMLA leave shall not be treated as or counted toward a break in service for purposes of vesting and eligibility to participate. Also, if the plan requires an employee to be employed on a specific date in order to be credited with a year of service for vesting, contributions or participation purposes, an employee on unpaid FMLA leave on that date shall be deemed to have been employed on that date. However, unpaid FMLA leave periods need not be treated as credited service for purposes of benefit accrual, vesting and eligibility to participate.

(5) Employees on unpaid FMLA leave are to be treated as if they continued to work for purposes of changes to benefit plans. They are entitled to changes in benefits plans, except those which may be dependent upon seniority or accrual during the leave period, immediately upon return from leave or to the same extent they would have qualified if no leave had been taken. For example if the benefit plan is predicated on a pre-established number of hours worked each year and the employee does not have

sufficient hours as a result of taking unpaid FMLA leave, the benefit is lost. (In this regard, § 825.209 addresses health benefits.)

(e) Equivalent Terms and Conditions of Employment. An equivalent position must have substantially similar duties, conditions, responsibilities, privileges and status as the employee's original position.

(1) The employee must be reinstated to the same or a geographically proximate worksite (i.e., one that does not involve a significant increase in commuting time or distance) from where the employee had previously been employed. If the employee's original worksite has been closed, the employee is entitled to the same rights as if the employee had not been on leave when the worksite closed. For example, if an employer transfers all employees from a closed worksite to a new worksite in a different city, the employee on leave is also entitled to transfer under the same conditions as if he or she had continued to be employed.

(2) The employee is ordinarily entitled to return to the same shift or the same or an equivalent work schedule.

(3) The employee must have the same or an equivalent opportunity for bonuses, profit-sharing, and other similar discretionary and non-discretionary payments.

(4) FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave, or to offer a promotion to a better position. However, an employee cannot be induced by the

employer to accept a different position against the employee's wishes.

(f) The requirement that an employee be restored to the same or equivalent job with the same or equivalent pay, benefits, and terms and conditions of employment does not extend to de minimis or intangible, unmeasurable aspects of the job. However, restoration to a job slated for lay-off when the employee's original position is not would not meet the requirements of an equivalent position.

29 C.F.R. § 825.216

Are there any limitations on an employer's obligation to reinstate an employee?

(a) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. For example:

(1) If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise. An employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration.

(2) If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon restoration. However, if a position on, for example, a night shift has been filled by another employee, the employee is entitled to return to the same shift on which employed before taking FMLA leave.

(b) If an employee was hired for a specific term or only to perform work on a discrete project, the employer has no obligation to restore the employee if the employment term or project is over and the employer would not otherwise have continued to employ the employee. On the other hand, if an employee was hired to perform work on a contract, and after that contract period the contract was awarded to another contractor, the successor contractor may be required to restore the employee if it is a successor employer. See § 825.107.

(c) In addition to the circumstances explained above, an employer may deny job restoration to salaried eligible employees ("key employees," as defined in paragraph (c) of § 825.217) if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer; or may delay restoration to an employee who fails to provide a fitness for duty certificate to return to work under the conditions described in § 825.310.

(d) If the employee has been on a workers' compensation absence during which FMLA leave has been taken concurrently, and after 12 weeks of FMLA leave the employee is unable to return to work, the employee no longer has the protections of FMLA and must look to the workers' compensation statute or ADA for any relief or protections.

APPENDIX E

[Letterhead - Offices of the Attorney General, Maryland Division of Correction]

July 11, 2000

Hon. Frederick N. Smalkin, Judge
U.S. District Court
Garmatz Federal Courthouse, Room 310
101 W. Lombard Street
Baltimore, Maryland 21201

Re: *Montgomery v. State of Maryland, et al.*, Civil No. S-00-CV-1019

Dear Judge Smalkin:

Pending before the Court in the above-referenced FMLA case is a motion to dismiss filed by this office on behalf of all Defendants. Plaintiff's response has not yet been filed.

The purpose of this letter is to withdraw, on behalf of all Defendants, the 11th Amendment immunity defense to Count II of the Complaint argued at pages 14-17 of Defendants' Memorandum in Support of Motion to Dismiss.

Thank you for your consideration in this matter.

Very truly yours,

/s/ Scott S. Oakley
Assistant Attorney General

SSO/dbm
cc: Robin R. Cockey, Esq.

APPENDIX F

[Letterhead - Office of the Attorney General]

May 9, 2001

FEDERAL EXPRESS

Patricia S. Connor
Clerk, United States Court of Appeals
for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, VA 23219

Re: *Montgomery v. State of Maryland, et al.*, No. 00-2099

Dear Ms. Connor:

I am writing to confirm the position I expressed during the oral argument of the above case and, I believe, in our brief, namely, that the State appellees assert that the Eleventh Amendment bars the plaintiff's claim filed under the Family and Medical Leave Act. I am enclosing copies of this letter that I respectfully request be circulated to Chief Judge Wilkinson and Judges Wilkins and Luttig, who comprise the panel assigned to the case.

Thank you for your consideration.

Sincerely,

/s/ ANDREW H. BAIDA
Solicitor General

cc: Jonathan R. Siegel, Esq.
Robin R. Cockey, Esq.
Deborah A. Jeon, Esq.
Alisa B. Klein, Esq.

Supreme Court, U.S.
FILED
MAR 1 2002
CLERK

No. 01-1079

IN THE
Supreme Court of the United States

SHEILA K. MONTGOMERY,

Petitioner,

v.

STATE OF MARYLAND, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

ANDREW H. BAIDA*
Solicitor General
200 St. Paul Place
Baltimore, Maryland 21202
(410) 576-6318

SCOTT S. OAKLEY
Assistant Attorney General
6776 Reisterstown Road
Baltimore, Maryland 21215
(410) 585-3073

*Counsel of Record

Attorneys for Respondents

QUESTIONS PRESENTED

1. Did the court of appeals correctly affirm the dismissal of petitioner's claim alleging a violation of the Family and Medical Leave Act ("FMLA") when she alleged that her reassignment was planned before she took leave and was due to a non-leave related grievance she filed, and the record demonstrated that her positions both before and after she took leave were in the same classification at the same grade and increment levels?

2. Did the court of appeals correctly hold that petitioner's FMLA claim is barred by Eleventh Amendment immunity when respondents asserted immunity after the district court concluded that the FMLA is not "appropriate legislation" under Section 5 of the Fourteenth Amendment, and petitioner has never contested the merits of that conclusion?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 7

I. THE FMLA CLAIM DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION 8

II. THE COURT OF APPEALS' DECISION ON THE MERITS OF THE FMLA CLAIM MAKES IT UNNECESSARY TO DECIDE THE IMMUNITY QUESTION THAT THE PETITIONER RAISES 13

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

American Nurses' Association v. Illinois, 783 F.2d 716 (7th Cir.1986) 9

Brown v. J.C. Penney Corp., 924 F.Supp. 1158 (S.D.Fla. 1996) 12

Conley v. Gibson, 355 U.S. 41 (1957) 9

Conn v. GATX Terminals Corp., 18 F.3d 417 (7th Cir.1994) 10

Edelman v. Jordan, 415 U.S. 651 (1974) 4

Estate of Porter v. Illinois, 36 F.3d 684 (7th Cir.1994) 14

Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459 (1945) 4

Gunderson v. Neiman-Marcus Group, Inc., 982 F.Supp. 1231 (N.D.Tex. 1997) 12

Gunnell v. Utah Valley State College,
152 F.3d 1253 (10th Cir.1998) 9
Gwinn Area Schools v. State of Michigan,
741 F.2d 840 (6th Cir.1984) 14
Kohls v. Beverly Enterprises Wisconsin, Inc.,
259 F.3d 799 (7th Cir.2001) 8
Lapides v. Board of Regents of University System of Georgia, 122 S.Ct. 456 (2001) 13,14
Newfield House, Inc. v. Massachusetts Dept. of Public Welfare, 651 F.2d 32 (1st Cir.), *cert. denied*, 454 U.S. 1114 (1981) 14
O'Connor v. PCA Family Health Plan, Inc.,
200 F.3d 1349 (11th Cir.2000) 9
Santos v. Knitgoods Workers' Union, Local 155,
252 F.3d 175 (2nd Cir.2001) 9
Silver v. Baggiano, 804 F.2d 1211 (11th Cir.1986) 14
Sutton v. Utah State School for the Deaf and Blind,
173 F.3d 1226 (10th Cir.1999) 14
Swierkiewicz v. Sorema N.A., 122 S.Ct. __,
2002 WL 261807 (2002) 9,11
Watkins v. J & S Oil Co., Inc.,
164 F.3d 55 (1st Cir.1998) 12
Wisconsin Department of Corrections v. Schacht,
524 U.S. 381 (1998) 4

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

U.S. Const. amend. XI ..... *passim*
U.S. Const. amend. XIV 3

29 U.S.C. § 2614(a)(1)(A) 11
29 U.S.C. § 2614(a)(1)(B) 11
29 U.S.C. § 2614(a)(3)(B) 8
29 C.F.R. § 825.215(a) 12
29 C.F.R. § 825.215(f) 12

STATEMENT OF THE CASE

Petitioner Sheila Montgomery is currently employed by Maryland's Eastern Correctional Institution ("ECI") as a secretary, classified under the State's Personnel Management System as an Administrative Aide Stenographer, in the facility's maintenance department. (App. 13a.)[1] Prior to taking extended leave in September 1999, Ms. Montgomery was assigned to the Warden's office as a secretary, under the same classification of Administrative Aide Stenographer. (*Id.*) In that capacity, she performed secretarial and administrative duties for the Warden. (*Id.*) In June 1999, ECI's Warden was replaced temporarily by Assistant Warden George Kaloroumakis. (Complaint ¶ 8.) Upon Assistant Warden Kaloroumakis's installment as Acting Warden, Ms. Montgomery alleged that her work environment changed dramatically and that she "for the first time experienced difficulties working for her immediate supervisor." (*Id.*) Ms. Montgomery alleged that Acting Warden Kaloroumakis treated employees in the Warden's office with little or no respect and "maintained an office environment that was hostile, stressful and full of personal friction." (*Id.*) Ms. Montgomery and her co-workers allegedly attempted without success to "induce" Acting Warden Kaloroumakis "to treat them in a more professional, considerate manner . . . ." (Complaint ¶ 9.)

Ms. Montgomery's employment situation purportedly became so unpleasant that, on September 9, 1999, she filed a grievance with the State of Maryland Personnel Management System. (*Id.*) The grievance alleged that "the derogatory demeanor and belittling comments of the Acting Warden (George Kaloroumakis) . . . create a hostile work environment which is detrimental to [Ms. Montgomery's]

---

[1] References to "App." are to the Appendix to the Petition for Writ of Certiorari.

career . . . and creates a hostile work place." (Complaint Exhibit A.) Petitioner asked "to be given the opportunity to perform [the] functions of her classification" and for the State to provide "meaningful conflict resolution" to resolve the situation with Acting Warden Kaloroumakis. (*Id.*)

On September 22, 1999, Ms. Montgomery commenced a previously scheduled extended medical leave for foot surgery. (Complaint ¶ 10.) While she was on leave, Robert Kupec was installed as ECI's new Warden. (Complaint ¶ 10.) Kaloroumakis returned to his position as Assistant Warden. (*Id.*) Upon her return to work on November 8, 1999, Ms. Montgomery was notified that she had been transferred to a secretarial position in the ECI maintenance department "at the same pay grade and increment level" that she had in the Warden's office. (Complaint Exhibit B.)

Following her transfer, Ms. Montgomery participated in a meeting with her supervisors from the Warden's office and the ECI personnel officer, as well as a meeting with a representative from her labor organization and Assistant Warden Kaloroumakis. (Complaint ¶¶ 12-13.) As Ms. Montgomery alleged in the section of her complaint entitled "Facts Giving Rise to this Action," at both meetings it was made clear that her transfer from the Warden's office had been anticipated prior to Warden Kupec's arrival at ECI, and that the transfer was the result of concerns that management at ECI had about the atmosphere in the Warden's office and a lack of professionalism and trustworthiness on Ms. Montgomery's part. (*Id.*)

While she remained classified in the same Administrative Aide Stenographer position, Ms. Montgomery was dissatisfied with her current employment as a secretary in the maintenance department. (Complaint ¶ 14.) According to Ms. Montgomery, her new duties were "the simplest, most menial of clerical functions: answering

the phone, taking messages, typing simple correspondence, and the like." (*Id.*) In addition, she alleged that her physical surroundings allegedly compared unfavorably with those in the Warden's office, as she now shared her work area with another employee. (*Id.*) Ms. Montgomery alleged that her transfer resulted in "significant emotional distress accompanied by physical symptoms" and the need for "medication and professional counseling." (Complaint ¶ 15.)

Ms. Montgomery brought suit in the United States District Court for the District of Maryland claiming that respondents (collectively "the State") violated the Due Process Clause of the Fourteenth Amendment and the FMLA. The State moved to dismiss Petitioner's complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. The State raised its immunity from suit under the Eleventh Amendment to the United States Constitution as a defense to both counts of the complaint, asserted that the conduct of the individual defendants was protected by qualified immunity, and also argued that Ms. Montgomery's transfer did not violate either the Fourteenth Amendment or the FMLA.

After filing the motion to dismiss, the State wrote a letter to the district court to withdraw, on behalf of all defendants, the Eleventh Amendment immunity defense with respect to Ms. Montgomery's FMLA claim. (App. 3a.) The district court subsequently issued a decision dismissing the complaint. (App. 15a.) Notwithstanding the State's withdrawal of its Eleventh Amendment immunity defense, the district court ordered the dismissal of the FMLA claim, noting its "duty not to enforce unconstitutional statutes," and holding that "the FMLA, as applied to the states, is clearly unconstitutional under the Eleventh Amendment, because it allows the states to be sued in a federal court without their consent, in the absence of a constitutionally-adequate

abrogation of that immunity by Congress." (*Id.*) The court also found that the State's withdrawal of the Eleventh Amendment immunity defense with respect to the FMLA claim did not "amount to a constitutionally significant consent to suit or other waiver of sovereign immunity by the State of Maryland under the Eleventh Amendment." (App. 16a.)

Ms. Montgomery subsequently appealed the district court's dismissal of her FMLA claim, which the court of appeals affirmed. Stating that "[t]he district court failed to recognize the discretion afforded it by [*Wisconsin Department of Corrections v.*] *Schacht*[, 524 U.S. 381 (1998)]" (App. 4a), the court of appeals observed that "[w]hen a state clearly contemplates the defense of sovereign immunity and then affirmatively and unequivocally decides to withdraw that argument, a district court errs in considering the issue *sua sponte*." (*Id.*) Noting that the State had invoked the defense of immunity in Ms. Montgomery's appeal, however, the court stated that it had "the discretion to consider Maryland's assertion of immunity even though the Attorney General attempted to withdraw it below." (App. 5a.) The court of appeals observed that the defense "sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court" (App. 6a) (quoting *Edelman v. Jordan*, 415 U.S. 651, 678 (1974)), that it has been considered "even though urged for the first time in this Court" (App. 6a) (quoting *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 467 (1945)), and that "a rule that prevented an appellate court from considering the defense *sua sponte* would impair the important sovereign interest that the Eleventh Amendment protects. Thus, the fact that Maryland did not assert the immunity defense below does not preclude the state from asserting it now." (App. 6a.)

The court of appeals also rejected Ms. Montgomery's contention that the State waived its Eleventh Amendment immunity by withdrawing the defense from its motion to dismiss, stating that, under Maryland law, "the Attorney General may not dispositively waive the defense of sovereign immunity on behalf of the state," and "[i]t is undisputed that Maryland's legislature has not authorized FMLA suits against the state nor has it allocated funds to satisfy FMLA judgments." (App. 7a.) Concluding that "there is the important interest of not having private individuals impose a levy on state treasuries without any consent by the state itself," and that there is also "a risk of judicially enforcing a private right of action which may rest upon an invalid exercise of Congressional authority" (App. 8a), the court determined that it might "abridge state sovereignty by failing to respect a claim of immunity in the face of the state's unequivocal assertion of it." (*Id.*)

Having concluded that it had the authority to address the State's immunity defense and that the defense had not been waived, the court of appeals noted that it recently "became the seventh federal court of appeals to hold that the FMLA does not abrogate the sovereign immunity of the states." (App. 9a) (citing cases). The court thus affirmed the district court's dismissal of Ms. Montgomery's claim "[b]ecause the FMLA does not validly abrogate Maryland's Eleventh Amendment immunity." (*Id.*)

Rather than rest its decision solely on immunity grounds, however, the court identified three alternative bases for rejecting Ms. Montgomery's FMLA claim on the merits. First, noting that "Montgomery has not alleged that she suffered actual monetary damages, either in lost wages or in the cost of providing care," the court observed that "her demand for monetary relief appears to be rooted solely in her claim for emotional damages." (App. 11a.) Stating that

"[t]he FMLA text nowhere provides, however, for recovery of damages for emotional distress" (*id.*), the court held that Ms. Montgomery's suit for damages "was properly dismissed even absent the Eleventh Amendment bar." (App. 12a.)

Second, the court stated that, while the FMLA requires employers to restore an employee returning from FMLA-related leave to either the same position or one with "[e]quivalent terms and conditions of employment" (*id.*), Ms. Montgomery's classification, "pay grade and increment level remained the same" (App. 13a), and she "received a four percent raise within two months of being transferred" and had "not lost any job security." (*Id.*) The court thus held that Ms. Montgomery failed to state a violation of the FMLA because her "complaint focuses on precisely the sorts of de minimus, intangible, and unmeasurable aspects of a job that the [FMLA] regulations specifically exclude." (App. 12a.)

Third, the court stated Ms. Montgomery's "complaint demonstrates that her change in status was not related to her assertion of rights under the Family and Medical Leave Act" but rather that it arose when, "[a]ccording to her own summary of her complaint, the Defendants transferred her 'to retaliate against her for filing a grievance and otherwise complaining of her work conditions.'" (App. 14a n.2.) The court thus held that, "[a]s it is evident that Montgomery would have been transferred even if she had not taken medical leave, she has no right to be returned to her pre-leave position." (*Id.*)

REASONS FOR DENYING THE WRIT

The petition should be denied because the court of appeals' decision conforms with prior decisions of this Court and similar decisions of other federal courts, and gives rise to no error that justifies the exercise of this Court's discretionary jurisdiction. The court of appeals did nothing extraordinary in applying well-settled pleading principles to Ms. Montgomery's allegations and concluding, on the basis of those allegations, that her FMLA claim was properly dismissed on the merits. That conclusion is supported by three independent grounds, one of which the petition does not even discuss, namely, that Ms. Montgomery did not suffer any damages warranting relief under the FMLA. None of those grounds involves any issue, much less one that is novel or exceptional, on which the lower federal courts require this Court's guidance.

There is thus no need to address the immunity ground that the court of appeals cited as yet another reason for affirming the district court's decision, because the resolution of that issue would be a strictly academic endeavor that would not change the disposition of this case. Just as significantly, even if the court of appeals had rejected Ms. Montgomery's FMLA claim solely on the basis of Eleventh Amendment immunity, the unique facts of this case make it extremely unlikely that review of the court's decision will have any effect beyond this litigation. Indeed, other than the courts below, no court has even addressed the unusual situation presented here in which a district court decided a case on immunity grounds after the State defendant withdrew that defense from its motion. Certiorari is unwarranted because the decision of the court of appeals rests on a factual scenario that has not arisen before and, in all probability, will not be repeated in the future.

I. THE FMLA CLAIM DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The court of appeals set forth three reasons, none of which warrants review, in holding that the allegations of the complaint make clear that Ms. Montgomery failed to state a violation of the FMLA. First, Ms. Montgomery has no right to be restored to the same position she had prior to taking leave because that position was not one "to which [she] would have been entitled had [she] never taken leave." 29 U.S.C. § 2614(a)(3)(B). Ms. Montgomery alleged that her work situation had sharply deteriorated in the months before she took leave, and that the situation became so intolerable that she filed a grievance protesting the "hostile work environment" in the Warden's office to which she was allegedly subjected. (Complaint ¶ 9.) She also alleged that her transfer from the Warden's office to the maintenance department was the result of the grievance she filed through the State Personnel Management System, not the fact that she took leave for foot surgery. (*Id.* ¶¶ 12, 13.) Ms. Montgomery also acknowledged that her transfer out of the Warden's office had been anticipated prior to her taking leave, and that the transfer was apparently the result of concerns ECI management had regarding Ms. Montgomery's professionalism and trustworthiness and the general atmosphere in the Warden's office. (*Id.*)

The complaint thus makes clear that Ms. Montgomery's transfer to the maintenance department was the result of circumstances that were completely independent of her leave. The court of appeals properly affirmed the dismissal of Ms. Montgomery's FMLA claim because the FMLA was not created to prevent employers from taking employment actions that they would have taken regardless of the employee's leave. *See Kohls v. Beverly Enterprises Wisconsin, Inc.*, 259 F.3d 799, 806 (7th Cir.2001) ("Beverly

would have been entitled to fire Kohls for mismanagement and mishandling of funds regardless of whether she had taken leave or not."); *Santos v. Knitgoods Workers' Union, Local 155*, 252 F.3d 175, 179 (2nd Cir.2001) ("Since the termination itself did not violate the FMLA, and since her loss of accrued sick leave was the consequence of termination under her employer's normal policy, Santos suffered no 'loss of any employment benefit' within the meaning of the FMLA."); *O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349, 1354-55 (11th Cir.2000) ("[W]e agree with the district court's ultimate conclusion that the termination of O'Connor during her period of FMLA leave, because it was part of a legitimate RIF, did not violate the statute."); *Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1262 (10th Cir.1998) ("[A]ny reason for terminating Gunnell's employment would not involve the FMLA, and consequently that statute can offer Gunnell no relief.").

In an attempt to manufacture an issue where none exists, Ms. Montgomery argues that "[t]he court's decision violates the fundamental principle of 'notice pleading' and misconceives the rule for construction of a complaint that contains both sufficient general allegations and specific allegations that the court finds insufficient." Pet. at 21. While Ms. Montgomery has no obligation to set forth in her complaint anything other than "sufficient general allegations," *see also Swierkiewicz v. Sorema N.A.*, 122 S.Ct. __, 2002 WL 261807 (2002); *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957), her own authority recognizes that "if the plaintiff, though not required to do so, pleads facts, and the facts show that he is entitled to no relief, the complaint should be dismissed. There would be no point in allowing such a lawsuit to go any further; its doom is foretold." *American Nurses' Association v. Illinois*, 783 F.2d 716, 727 (7th Cir.1986). Although the court concluded that the

complaint in that case should not have been dismissed because it included not only "invalid claims" but also "a valid one," *id.* at 725, the complaint in this case, in the words of the same judge (Posner, J.) who wrote *American Nurses*, is one in which "[t]he plaintiff pleaded [her]self out of court," *Conn v. GATX Terminals Corp.*, 18 F.3d 417, 419 (7th Cir. 1994), as Ms. Montgomery's complaint sets forth no valid claims but only invalid ones.

While Ms. Montgomery contends that the court of appeals' retaliation determination is based on "the now-abandoned Count I of petitioner's complaint," Pet. at 28, the court stated explicitly that, according to Petitioner's "own summary of her complaint," she would have been transferred even had she not taken leave. (App. 14a n.2.) Contrary to Ms. Montgomery's assertion that her retaliation theory is unique to her non-FMLA claim, her FMLA count expressly "incorporated by reference" (Complaint ¶ 19) facts set forth in a prior section of her complaint entitled "Facts Giving Rise to this Action," in which Ms. Montgomery specifically alleged that she filed a grievance prior to taking leave "protesting Deputy Warden Kaloroumakis's creation of a 'hostile work environment'" (*id.* ¶ 9); that upon her return from leave she attended a meeting in which she was told "her reassignment was already 'in the makes'" when the new warden arrived while she was out on leave (*id.* ¶ 12); that several days later she attended another meeting with the new warden, a union representative, "and another office worker who – like Ms. Montgomery – had been transferred out of the Warden's office after complaining about the hostile work environment created by Deputy Warden Kaloroumakis" (*id.* ¶ 13); and that "[a]s a result of Ms. Montgomery's apparently retaliatory exile from a position as administrative aide in the Warden's office to a position as secretary in the maintenance department, she has undergone significant

emotional distress." (*Id.* ¶ 15.) The court of appeals committed no error, much less one deserving of this Court's attention, in carefully resting its ruling on the basis of these allegations, and concluding that Ms. Montgomery had no right under the FMLA to be returned to her pre-leave position when she would have been transferred regardless of whether she took leave.

For this reason alone, there is no reason to remand this case in light of the Court's decision in *Swierkiewicz v. Sorema N.A.*, 122 S.Ct. __, 2002 WL 261807 (2002). While "the Federal Rules do not contain a heightened pleading standard for employment discrimination suits," *id.*, 2002 WL 261807 at *5, a plaintiff nevertheless may, as the United States and EEOC observed in their joint amicus brief in that case, "plead himself out of a cause of action by alleging facts that conclusively foreclose relief." Br. at 10. Review should be denied because that is the situation here.

The second reason that the court of appeals provided in determining that Ms. Montgomery failed to state a violation of the FMLA is also no justification for remanding this case in light of *Swierkiewicz*, as the appellate court decided nothing legally remarkable in concluding that the purported differences between her job assignments were "not of sufficient magnitude, especially given the equivalent pay grade, increment level, and administrative classification, to constitute an FMLA violation." (App. 13a.) The FMLA provides that employees are entitled either to be returned to "the position of employment held by the employee when the leave commenced," or "to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." 29 U.S.C. § 2614(a)(1)(A) and (B). The FMLA does not require, however, an employee's restoration to the exact same

position or a position with identical duties.[2]

Rather, while an "equivalent position" is defined as "one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions," 29 C.F.R. § 825.215(a), the court of appeals in this case held that "[e]quivalent terms and conditions of employment, however, do not require equivalence with respect to 'the de minimus or intangible, unmeasurable aspects of the job.'" (App. 12a) (quoting 29 C.F.R. § 825.215(f)). The court correctly concluded that because Petitioner's pay grade, increment level, classification, and job security remained the same when she returned from leave, the differences she complained about, "such as the alleged reduction in the complexity of her tasks and the sharing of work space" (App. 13a), are "not of such import as to implicate the protections of the governing federal law." (*Id.*)

Ms. Montgomery argues that, "[u]nder the federal rules, there is no requirement that petitioner plead specific details of exactly how her current job fails to be equivalent to her

---

[2] *See, e.g., Watkins v. J & S Oil Co., Inc.,* 164 F.3d 55, 59 (1st Cir.1998) (stating that an equivalent position is one that "is substantially equal or similar, not necessarily identical or exactly the same"); *Gunderson v. Neiman-Marcus Group, Inc.*, 982 F.Supp. 1231, 1238 (N.D.Tex. 1997) (FMLA was not violated where the plaintiff, who had previously been assigned to a cosmetics counter, was restored to a "floater" sales position upon return from her leave because the latter position afforded the plaintiff equivalent pay, benefits, and status); *Brown v. J.C. Penney Corp.*, 924 F.Supp. 1158, 1163 (S.D.Fla. 1996) ("the FMLA does not require that an employee be returned to the exact position that he held prior to embarking on his leave").

previous job," Pet. at 27, but the court of appeals did not commit any error in acting on her decision to do so. Petitioner incorrectly asserts that the court relied on "specific allegations" to "limit the general allegations," *id.*, as the "general allegations" she quotes (*id.* at 26) are actually specific allegations that are part of a series of contentions in the complaint (¶ 14) setting forth in detail how, in Ms. Montgomery's view, the two jobs are not the same. The court of appeals properly concluded that these allegations failed to establish a violation of the FMLA.

Ms. Montgomery does not even address the third reason that the court of appeals provided in dismissing her damages claim under the FMLA. As with the other reasons provided by the court in disposing of that claim, however, the court decided no exceptional question of law in holding that the claim was barred because it was based solely on emotional harm that Ms. Montgomery allegedly suffered, and the FMLA does not provide for recovery of such damages. Petitioner's abandonment of her request for that relief underscores the insubstantial nature of her petition and the absence of any need to grant it.

II. THE COURT OF APPEALS' DECISION ON THE MERITS OF THE FMLA CLAIM MAKES IT UNNECESSARY TO DECIDE THE IMMUNITY QUESTION THAT THE PETITIONER RAISES.

There is no need to address the immunity issue Ms. Montgomery raises, or to hold this case pending the outcome of *Lapides v. Board of Regents of University System of Georgia*, 122 S.Ct. 456 (2001) (No. 01-298), in light of the reasons the court of appeals provided in rejecting her FMLA claim and holding that the complaint was properly dismissed on the alternative ground that it failed to establish an FMLA violation. While the court of appeals had a firm basis for

resolving the immunity question as it did, this Court's resolution of that issue would be a purely academic exercise that would not affect the outcome of this case.

In addition, as evidenced by Ms. Montgomery's failure to identify any case that is remotely similar to the unusual procedural posture of this one, certiorari would not be warranted even if the court of appeals had based its decision on immunity grounds only. Unlike the removal question in *Lapides* over which the federal courts have long been divided,[3] the question in this case – "Whether a state defendant that raises the defense of state sovereign immunity, but then expressly withdraws it, is thereafter barred from reasserting immunity" (Pet. at i) – apparently has never arisen before, as Petitioner has cited no case in which a district court, or a federal appellate court for that matter, has dismissed a complaint on the basis of Eleventh Amendment immunity after the State defendant withdrew that defense. Ms. Montgomery's inability to locate any case like this confirms that this is a unique situation that stands alone, rather than one, as she contends, that "presents a distinct, important, recurring question that has vexed the courts of appeals." Pet. at 13. The federal courts can hardly have been vexed by a question they have not previously been asked to address, much less to decide.

---

[3] *Compare Estate of Porter v. Illinois*, 36 F.3d 684, 691 (7th Cir.1994) (no waiver); *Silver v. Baggiano*, 804 F.2d 1211, 1214-15 (11th Cir.1986) (same); *Gwinn Area Schools v. State of Michigan*, 741 F.2d 840, 846-47 (6th Cir.1984) (same) *with Sutton v. Utah State School for the Deaf and Blind*, 173 F.3d 1226, 1236 (10th Cir.1999) (waiver) *Newfield House, Inc. v. Massachusetts Dept. of Public Welfare*, 651 F.2d 32, 36 n.3 (1st Cir.) (same), *cert. denied*, 454 U.S. 1114 (1981).

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

ANDREW H. BAIDA*
Solicitor General
200 St. Paul Place
Baltimore, Maryland 21202
(410) 576-6318

SCOTT S. OAKLEY
Assistant Attorney General
6776 Reisterstown Road
Baltimore, Maryland 21215
(410) 585-3073

*Counsel of Record

Attorneys for Respondents

March 4, 2002

(3)

No. 01-1079

SUPREME COURT, U.S.
FILED
MAR 18 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SHEILA K. MONTGOMERY,
Petitioner,

v.

STATE OF MARYLAND et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY BRIEF

DEBORAH A. JEON
American Civil Liberties Union Foundation of Maryland
100 North Liberty Street
Centreville, MD 21617

ROBIN R. COCKEY
Cockey, Brennan & Maloney, P.C.
116 W. Main Street
Salisbury, MD 21801

JONATHAN R. SIEGEL
Counsel of Record
Professor of Law
George Washington University Law School
2000 H St., N.W.
Washington, DC 20052
(202) 994-7453

138

TABLE OF CONTENTS

Page

Table of Authorities ii

I. THE SOVEREIGN IMMUNITY ISSUE 1

II. THE PLEADING ISSUE 3

A. *Swierkiewicz* Demonstrates the Error of the Fourth Circuit's Decision 4

B. Respondents' Arguments on the Pleading Issue are Unavailing 5

1. The Allegations of Non-Equivalence 5

2. Petitioner's lack of damages 6

3. The inconsistent allegation 7

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Cooper v. Olin Corp., 246 F.3d 1083 (8th Cir. 2001) 6

Hill v. Blind Industries & Services of Maryland, 179 F.3d 754 (9th Cir. 1999), *opinion amended*, 201 F.3d 1186 (9th Cir. 2000) 2

In re SDDS, Inc., 225 F.3d 970 (8th Cir. 2000) 2

Lapides v. Board of Regents of University System of Georgia, 122 S. Ct. 456 (2001) (No. 01-298) 1,3,10

LensCrafters, Inc. v. Sundquist, 2002 WL 205799 (M.D. Tenn. Feb. 8, 2002) 1

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 7

Swierkiewicz v. Sorema N.A., 122 S. Ct. 992 (2002) 4,5,10

Swierkiewicz v. Sorema, N.A., 2001 WL 246077 (2d Cir. 2001) 5

Statutes

Family and Medical Leave Act (FMLA) ..... *passim*

29 U.S.C. § 2617(a)(3) 7

Rules and Regulations

Fed. R. Civ. Proc. 8(e)(2) 4,7,8

29 C.F.R. § 825.215(a) 6

I. THE SOVEREIGN IMMUNITY ISSUE

The petition for certiorari demonstrated that this case presents an important question of federal law on which the circuits are in conflict. Numerous lower courts are struggling to understand the boundaries of one of the few remaining categories of cases in which private parties can sue states, namely, cases in which a state waives its immunity from suit. The circuits are in conflict as to whether a state waives its immunity if it litigates the merits of a case without properly asserting immunity. This case presents an appropriate vehicle for resolving this conflict. The case is also closely related to the pending case of *Lapides v. Board of Regents of University System of Georgia*, 122 S. Ct. 456 (2001) (No. 01-298).

Respondents hardly even defend the holding of the court of appeals on the immunity issue. Their opposition makes only two points, neither related to the merits of the issue and both incorrect. First, respondents assert that any ruling on the issue would be "academic" because of the Fourth Circuit's holding that petitioner's complaint fails to state a claim. Opposition ("Opp.") 13-14. This is plainly incorrect, because petitioner is challenging that holding as well. *See* Point II, *infra*. If petitioner prevails on both issues, she will win and this Court will reverse. So the sovereign immunity issue is not academic.

Second, respondents assert that no other case is "remotely similar" to this one. Opp. 14. This is also incorrect. As the petition demonstrated, this case presents the same issue as cases from several other circuits, including cases that conflict with it. Indeed, a recent district court opinion specifically cites this case and other cases discussed in the petition as showing that "circuits are split as to whether voluntary appearance and defense on the merits constitutes waiver of Eleventh Amendment immunity." *LensCrafters, Inc. v. Sundquist*, 2002 WL 205799, *6 n.3 (M.D. Tenn. Feb. 8 2002). This Court should grant certiorari to resolve this circuit split.

The cases involve the same situation: a state defendant has litigated a case's merits without properly asserting a defense of state sovereign immunity. They raise the same question: whether, having done so, the state may later assert the defense belatedly or whether the defense is barred. *See* Pet. 11-13.

It is true that in some other cases the state defendant's failure to make a proper assertion of its sovereign immunity took the form of failing to raise the defense at all, whereas in this case the state first raised the defense but then withdrew it. Plainly, however, raising a defense and then withdrawing it is equivalent to failing to raise the defense in the first place. The cases therefore present the same situation and the same issue.

Moreover, as the petition discussed in detail, some of the other cases conflict with the present case. *See* Pet. 13-15 (citing *Hill v. Blind Industries & Services of Maryland*, 179 F.3d 754 (9th Cir. 1999), *opinion amended*, 201 F.3d 1186 (9th Cir. 2000) and *In re SDDS, Inc.*, 225 F.3d 970 (8th Cir. 2000)). Side-by-side comparison of these cases with the present case clearly demonstrates the error of respondents' claim that the cases are not "remotely similar":

Hill and *SDDS*	*Montgomery*
State defendant litigates the merits of a case without raising the defense of sovereign immunity. *Held*, the defense is barred.	State defendant litigates the merits of a case and withdraws the defense of sovereign immunity. *Held*, the defense is *not* barred.

See Pet. 13-15. Again, raising the defense of sovereign immunity and then withdrawing it is equivalent to failing to raise the defense at all. Certainly respondents offer no reason why the latter should bar subsequent assertion of the defense but the former should not.

Indeed, if the distinction respondents raise does anything, it

only heightens the conflict between the cases. By raising the defense of sovereign immunity and then withdrawing it, respondents made clear that they did not simply forget to raise the defense. They raised the defense and then withdrew it expressly. To the extent that this is different from not raising the defense at all, the difference only cuts against respondents.

Contrary, therefore, to respondents' assertion, this case presents the same situation as other cases cited in the petition, and their holdings conflict. *See LensCrafters*, *supra*. This Court should grant certiorari to resolve the conflict.

Finally, respondents offer no adequate rebuttal to petitioner's argument that this case should, at a minimum, be held pending this Court's decision in *Lapides*, *supra*. As the petition explained, that case will likely offer important guidance on the question whether a state's actions, taken in the course of litigation, may waive the state's sovereign immunity. The case will also likely offer valuable guidance on another issue that played an important role in the Fourth Circuit's decision in the present case, namely, the relevance of the state's attorneys' claimed lack of authority, under state law, to waive sovereign immunity. As the petition noted, the Fourth Circuit's decision conflicts with decisions of other circuits on that point as well. *See* Pet. 14-15. If the Court does not grant certiorari, it should hold this petition pending its decision in *Lapides*.

II. THE PLEADING ISSUE

The petition for certiorari also demonstrated that this case presents an important issue, as to which the circuits are in conflict, regarding the proper construction of complaints under the Federal Rules of Civil Procedure. Petitioner's complaint contains plainly sufficient, general allegations that respondents failed to restore her, following her FMLA leave, to her previous job or to an equivalent job. Complaint, ¶¶ 14, 20; *see* Pet. 2-3, 21. The court of appeals incorrectly, and in conflict with

decisions from other circuits, disregarded these allegations and dismissed the complaint because the complaint's more specific allegations were, in the court's view, insufficient by themselves to state a claim. In doing so, the court violated the basic principle of notice pleading. The court of appeals also disregarded the plain dictates of Federal Rule 8(e)(2), which expressly permits complaints to contain inconsistent allegations.

A. *Swierkiewicz* Demonstrates the Error of the Fourth Circuit's Decision.

The petition for certiorari noted the then-pending case of *Swierkiewicz v. Sorema N.A.*, 122 S. Ct. 992 (2002), and suggested that this Court's decision would likely have an impact on this case. This Court decided *Swierkiewicz* on February 26, 2002, and its decision demonstrates the error of the Fourth Circuit's ruling on the pleading issue.

This Court's decision shows that a complaint that gives "fair notice of the basis for [plaintiff's] claims" is sufficient under the Federal Rules even if it is "based on conclusory allegations." *Swierkiewicz*, 122 S. Ct. at 999. That point is key here: The Fourth Circuit held that petitioner's complaint fails to allege that her current job is not equivalent to her previous job, but the complaint expressly alleges that, following petitioner's FMLA leave, the respondents "refus[ed] to reinstate [her] . . . to a position the same as or substantially equivalent to" her previous position. Complaint, ¶ 20. The Fourth Circuit simply ignored this allegation. *Swierkiewicz* shows that the allegation is sufficient even though it is conclusory.

The Fourth Circuit disregarded petitioner's general allegation and focused instead on her specific allegations. The Second Circuit acted similarly in *Swierkiewicz*. With regard to Swierkiewicz's claim of age discrimination, the Second Circuit said that the specific circumstance alleged in support of it (that

the defendant's president said he wanted to "energize" Swierkiewicz's department) was insufficient. *Swierkiewicz v. Sorema, N.A.*, 2001 WL 246077, **2 (2d Cir. 2001). This Court's reversal shows that a court may not dismiss a complaint based on the perceived insufficiency of its specific allegations when the complaint contains sufficient, general allegations.

Petitioner's complaint obviously gives the "fair notice of the basis for petitioner's claims" that *Swierkiewicz* requires. The basis is simple: petitioner claims that she took leave under the FMLA and, upon return from leave, was not restored to her previous job or to an equivalent job. Instead of asking whether petitioner gave fair notice of the basis for her claims, the Fourth Circuit incorrectly inquired whether petitioner pleaded sufficient factual details regarding the alleged differences between the two jobs. *Swierkiewicz* shows that this was error.

If this Court does not grant certiorari in this case, it should vacate the Fourth Circuit's decision and remand the case for further consideration in light of *Swierkiewicz*.

B. Respondents' Arguments on the Pleading Issue are Unavailing.

Respondents make several arguments as to the pleading issue, but none of them refutes petitioner's basic points.

1. The Allegations of Non-Equivalence: Respondents claim that the court of appeals could disregard petitioner's general allegations that her current job is not equivalent to her previous job because these allegations are merely "part of a series of contentions in the complaint (¶ 14) setting forth in detail how, in Ms. Montgomery's view, the two jobs are not the same." Opp. 13. That is incorrect. Petitioner chose to allege, in her complaint, *some* of the specific ways in which the two jobs are not the same, but there is no suggestion that the details given are the *only* differences between the two jobs, any more than Swierkiewicz's decision to allege that the president of his

company said he wanted to "energize" his department showed that that statement was Swierkiewicz's *only* evidence of his employer's motive for firing him. Petitioner's general allegation of non-equivalence, like Swierkiewicz's general allegation of motive, must therefore be accepted as true. The court of appeals could not disregard this sufficient, general allegation merely because it believed petitioner's more specific allegations did not, by themselves, state a claim.

Respondents also emphasize that petitioner lost no pay or benefits, and her job classification did not change, as the result of her transfer. That is true, but it does not defeat petitioner's allegation that her new job is not equivalent to her previous job. Two jobs are equivalent under the FMLA only if they are "virtually identical . . . in terms of pay, benefits and working conditions, including privileges, perquisites and status" and "involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority." 29 C.F.R. § 825.215(a). Two jobs may therefore be different for FMLA purposes even if they concededly entail the same "job title, classification, pay, and benefits." *See Cooper v. Olin Corp.*, 246 F.3d 1083, 1091 (8th Cir. 2001).

Petitioner alleged that her two jobs were not equivalent, and entailed substantially different duties, and the court of appeals incorrectly believed it could disregard these general allegations and look only to petitioner's specific allegations. This Court should grant certiorari to resolve the conflict in the circuits regarding the proper way to construe a complaint that contains both general and specific allegations. *See* Pet. 23-25.

2. Petitioner's lack of damages: Respondents correctly note that the court of appeals held that petitioner has not suffered damages that are compensable under the FMLA. However, respondents are plainly incorrect to suggest that petitioner's lack of damages could be a reason to dismiss her

entire FMLA claim, *see* Opp. 7-8, and the court of appeals did not so hold. In addition to her request for damages, petitioner sought, and still seeks, injunctive relief restoring her to her previous position. The court of appeals correctly recognized that petitioner could be entitled to such relief even if she has not suffered compensable damages. *See* Pet. App. 12a (noting that petitioner's claim for reinstatement "remain[s]" despite her lack of damages). Petitioner's lack of damages is not, therefore, a ground supporting dismissal of her FMLA claim.[1]

3. The inconsistent allegation: Respondents devote much of their opposition to their assertion that petitioner's own complaint demonstrates that she was transferred for a reason that was independent of her FMLA leave. Opp. 8-11. The short answer is that the Federal Rules of Civil Procedure expressly permit complaints to contain inconsistent allegations. *See* Pet. 25-26, 28; Fed. R. Civ. Proc. 8(e)(2).

There is a dispute as to why petitioner was transferred. It is true that Count I of the complaint asserts that petitioner was transferred because of a grievance she filed. This allegation may be inconsistent with Count II of the complaint, which is based on the FMLA, but the federal rules expressly permit such inconsistency. *See* Pet. 28. Respondents never adequately deal with this simple point.

Respondents note that the court of appeals relied on what it

---

[1] Petitioner desires to assert her claim for injunctive relief against all the respondents, including the state itself. This Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996), shows that petitioner may assert this claim against the state only if she prevails on her argument that the state has waived its sovereign immunity from suit. The ruling on this point may be of considerable practical importance if petitioner ultimately wins the case, since her judgment against respondents would include attorney's fees. *See* 29 U.S.C. § 2617(a)(3). Petitioner would be in a much better position if such a judgment could be entered against the state, instead of the individual respondents, against whom it might prove uncollectible.

called the petitioner's own "summary" of her complaint. *See* Opp. 10; Pet. App. 14a. This reliance, however, adds nothing. The quotation given by the court of appeals is from a memorandum petitioner filed in the district court. The full sentence, of which the court of appeals quoted a portion, is:

> In this case, Plaintiff has alleged individual Defendants banished her to the maintenance department upon her return from FMLA leave because they wished to retaliate against her for filing a grievance and otherwise complaining of her work conditions.

Memorandum in Support of Plaintiff's Opposition to Motion to Dismiss 5. This sentence is not a "summary" of the complaint; it is simply an accurate restatement of one allegation of the complaint. It was relevant to one argument being made in the memorandum. Petitioner's complaint cannot be dismissed because it contains an inconsistent allegation as expressly permitted by Rule 8(e)(2); no more can it be dismissed because petitioner had occasion to restate that inconsistent allegation in opposing the respondents' motion to dismiss.

Respondents also make two arguments not relied upon by the court of appeals. First, respondents assert that petitioner's complaint "allege[s]" and "acknowledge[s]" that her transfer was planned prior to her leave and was "apparently the result" of concerns her managers had about her professionalism and trustworthiness. Opp. i, 8. This is a misrepresentation of the complaint. The complaint acknowledges only that managers *said* certain things to petitioner about why she was transferred. Complaint, ¶¶ 12-13. Obviously, there is a difference between acknowledging what managers *said* and accepting managers' statements as *true*.

Second, respondents note that Count II of the complaint incorporates the complaint's factual allegations by reference.

Opp. 10-11. That is true, but it adds nothing.[2] The complaint's factual section alleges that petitioner's transfer temporally followed two things: (1) her filing of a grievance, and (2) her FMLA leave. Complaint, ¶¶ 9-11. It makes no assertion as to which of these events *caused* petitioner's transfer.[3] The two counts of the complaint then, as the federal rules expressly permit, set forth two different legal theories. Count I asserts that petitioner was transferred *because* she filed a grievance and asserts a violation of the Due Process Clause; Count II asserts petitioner's FMLA claim. The federal rules permit petitioner to assert theories that rest on different and potentially inconsistent assumptions as to what really caused her transfer. As the petition noted, the use of inconsistent theories is perfectly appropriate at this early stage of the case, because at this stage the true cause of petitioner's transfer is best known to the respondents.

---

[2] Respondent's assertion that the court of appeals "carefully rest[ed] its ruling" on these incorporated allegations, Opp. 11, is also entirely fanciful. As to this point, the court of appeals cited only what it called petitioner's "summary" of her complaint, considered above. *See* Pet. App. 14a.

[3] Paragraph 15 of the complaint alleges that petitioner suffered an "apparently retaliatory exile," but that assertion is consistent with either of petitioner's theories of relief.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be held pending this Court's decision in *Lapides* and then disposed of appropriately, or the judgment of the court of appeals should be vacated and the case remanded for further consideration in light of this Court's decision in *Swierkiewicz*.

Respectfully submitted,

DEBORAH A. JEON
American Civil Liberties Union Foundation of Maryland
100 North Liberty Street
Centreville, MD 21617
(410) 758-1975

ROBIN R. COCKEY
Cockey, Brennan & Maloney, P.C.
116 W. Main Street
Salisbury, MD 21801
(410) 546-1750

JONATHAN R. SIEGEL
Counsel of Record
Professor of Law
George Washington University Law School
2000 H St., N.W.
Washington, DC 20052
(202) 994-7453

MARCH 2002